

# Opinions, Advice, and Legislation Quarterly News

Office of the  
Maryland Attorney General



October - December 2005

## OPINIONS

### CIVIL RIGHTS AND DISCRIMINATION – RACE – HIGHER EDUCATION – STANDARDS FOR MEASURING THE STATE’S SUCCESS IN DISMANTLING THE PAST SYSTEM OF *DE JURE* SEGREGATION IN PUBLIC HIGHER EDUCATION

The Secretary of the Maryland Higher Education Commission posed a series of questions about how to determine whether the State has complied with its obligations to dismantle the prior regime of *je jure* segregation in the public higher education system. The leading case on this issue is *United States v. Fordice*, 505 U.S. 717 (1992), in which the Supreme Court held that a state that had abrogated the laws that enforced segregation in its higher education system was also required to demonstrate that it had not left in place policies that perpetuated segregation. The Court stated:

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects – whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system – and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.

*Fordice*, 505 U.S. at 731-32. In its opinion, the Court applied these criteria to four policies:

admissions standards, program duplication, institutional mission assignments, and the state’s continued operation of all previously segregated institutions.

**Question 1:** How should higher education officials in Maryland assess whether policies and programs traceable to Maryland’s history of racial segregation are “educationally justified” and can be “practicably eliminated?”

**Answer:** The *Fordice* decision requires the following four-step assessment of the State’s higher education policies and practices:

(A) Is the policy or practice traceable to prior segregation?

If it is not, the inquiry ends.

If it is, then an analysis of the effects of the policy or practice is necessary.

(B) Does the policy or practice have segregative effects?

If it does not, the inquiry ends.

If it does, then the justification for the policy or practice must be evaluated.

(C) Is the policy or practice supported by sound educational purposes?

If it is not, then it is not consistent with the State’s obligations under the Equal Protection Clause and Title VI, as construed in the *Fordice* decision.

If it is, then alternative ways of accomplishing those purposes must be considered.

In evaluating educational justifications, substantial deference is accorded to the judgment of educators, particularly when that judgment advances well-reasoned goals and is supported by evidence. The priorities established in the State Plan for Higher Education or in the current

agreement with the federal government can provide a sound educational basis for such policies.

**(D)** Can the educational purposes of the policy or practice be feasibly accomplished by less segregative means?

If they can, then the policy or practice is not consistent with the State's obligations under the Equal Protection Clause.

If they cannot, then the policy or practice is consistent with the State's obligations under the Equal Protection Clause.

**Question 2:** How should those officials assess whether the State has discharged its responsibilities with respect to four types of policies analyzed in *Fordice*: admissions standards, program duplication, institutional mission assignments and continued operation of all previously segregated institutions?

**Answer:** For each policy, the analysis set forth in (1) must be applied.

**Question 3:** Are there other factors related to Maryland's higher education system that should be evaluated for this purpose and, if so, what are those factors?

**Answer:** The State's responsibilities extend to any policies and practices traceable to *de jure* segregation that have segregative effects. The current agreement with the federal government identifies other factors that may be implicated in the dismantling of the State's previously segregated higher education programs.

In addition to the review of specific policies under the *Fordice* standards, the assessment of Maryland's success in dismantling the system of *de jure* segregation must also take account of the extent to which the State has complied in good faith with the requirements of its desegregation plans over several decades.

90 *Opinions of the Attorney General* 153  
November 8, 2005

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**ELECTIONS – CAMPAIGN FINANCE –  
WHETHER CANDIDATE MAY SERVE AS  
CHAIRMAN OF POLITICAL COMMITTEE OTHER  
THAN THE CANDIDATE'S OWN COMMITTEE**

**Question:** May a candidate serve as a chairman of a campaign finance entity other than the candidate's own political committee?

**Answer:** The State Board of Elections ("SBE") currently permits a candidate to serve as chairman of a campaign finance entity in addition to the candidate's own political committee if the former position does not exercise authority or general responsibility for the conduct of the campaign. However, language added to one of the pertinent statutory provisions of the State election law in 2002 during its recodification in the Election Law Article raises a significant question whether the General Assembly intended to bar a candidate from serving as the chairman of other political committees in all cases. Neither the statutory language nor the legislative file for the 2002 recodification gives a conclusive answer to this question. We recommend that the General Assembly clarify its intention by an appropriate amendment of the Election Law Article. Pending such legislative clarification, the SBE's current interpretation is a defensible construction of the relevant provisions. That construction may be accorded greater weight by the courts if SBE incorporates it in an interpretative regulation.

90 *Opinions of the Attorney General* 187  
December 5, 2005

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**ESTATES AND TRUSTS  
ORPHANS' COURT – ORPHANS' COURT  
REVIEW REQUIRED WHEN ESTATE FUNDS  
ARE USED TO PAY ATTORNEY'S FEES**

**Question:** Under what circumstances must a petition for attorney's fees be filed with the orphans' court when a decedent, typically an individual who suffered from an asbestos-related terminal illness, entered into a contingent fee

agreement with an attorney for legal services prior to death?

**Answer:** Orphans' Court review is required whenever estate funds are used for the payment of attorney's fees. This review should occur even if the estate is a small estate and regardless of when legal services are rendered.

*90 Opinions of the Attorney General 145*  
November 3, 2005

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**PUBLIC OFFICERS AND EMPLOYEES  
BUDGETARY ADMINISTRATION - STATUS  
OF RETIREE HEALTH CARE BENEFITS  
IN LIGHT OF THE GOVERNMENT ACCOUNTING  
STANDARDS BOARD STATEMENT 45**

New standards recently adopted by the Government Accounting Standards Board ("GASB") that affect how a government employer is to account for liabilities related to employee benefits. In particular, GASB Statement 45 ("GASB 45") requires that a government employer accrue liabilities associated with the employer's commitment to retiree benefits and recognize them on its balance sheet.

**Question 1:** Does the State have a statutory, contractual, or other legal obligation to provide or to continue to provide health benefits to any of the following groups: current vested retirees receiving health benefits; employees or former employees that have fully vested with 16 years of creditable service (deferred vested individuals); current employees with less than 16 years of State service who may vest at a later date; or future employees?

**Answer:** The State currently has a statutory obligation to provide health care benefits to certain retirees; however, the statute does not create a contractual obligation and the General Assembly remains free to amend the law that provides such benefits. Although the General Assembly may choose to confer a vested right in retiree health care benefits, it has not done so. Even a contractual right to health care benefits would be subject to modification if reasonable and necessary to serve an important public purpose.

**Question 2:** In terms of other states and local governments, particularly with regard to other AAA bond-rated states, does any relevant case law exist regarding the provision or alteration of retiree health benefits, and if so, how are these cases distinguishable from the situation in Maryland?

**Answer:** With respect to other states that, like Maryland, enjoy the highest credit rating from the bond rating agencies, we found no relevant case law. There are cases in other states that have reached various conclusions; some of those decisions recognize a contractual obligation to provide health care benefits to retirees. However, those cases are of limited value in construing Maryland law as they are based on the particular state constitution, statute, collective bargaining agreement, or other circumstances peculiar to the case.

**Question 3:** Are there any legal distinctions between the contractual rights that exist for pension benefits and promised retiree health benefits? Specifically, does the fact that the health insurance benefit accrues over the career of an employee similar to pension benefits create a similar contractual right to those benefits? Because current case law in Maryland indicates that the contractual right to pension benefits accrues over the career of an employee, does the fact the health insurance benefits accrue over the career of an employee result in a similar contractual right to those benefits? Additionally, since case law indicates that the contractual right to pension benefits is created at the time the employee vests in the pension system, if there is no contractual right to health insurance benefits, how is vesting for pension benefits distinguished from vesting for retiree health insurance benefits?

**Answer:** In contrast to retiree health care benefits, pension benefits are contractual in nature. The statutes creating the various retirement systems explicitly vest certain rights in retirees with respect to the type and level of benefits, while the statute concerning retiree health care benefits does not. Prior opinions of this Office and court decisions confirm that the pension benefits are a contractual obligation. The fact that the amount of a retiree's subsidy for health care benefits may be related to length of State service does not alter this essential distinction.

**Question 4:** Can the State's legal obligations regarding retiree health care for any of the enumerated groups in Question 1 be altered as the result of a collective bargaining agreement entered into by the Administration and employee representatives?

**Answer:** Collective bargaining negotiations could result in changes in the State's legal obligations concerning retiree health benefits, but only if the General Assembly specifically adopted those changes.

**Question 5:** GASB Statement 45 will require the State to report liabilities and obligations for retiree health care in the same way as pension liability. Does GASB 45 create any legal obligation for the State to treat promised retiree health benefits the same as promised pension benefits? Additionally, GASB 45 strongly encourages prefunding of retiree health liabilities in the same manner as pensions are prefunded. If the State were to create a non-revocable trust fund in response to the GASB 45 requirements, does this action create any legal obligation to provide retiree health benefits to any of the groups enumerated in the first question and if so, at the current level or some other level? Does this change if the employees are required to make a contribution towards retiree health care similar to the employee pension contribution?

**Answer:** GASB 45, as an accounting standard issued by a private entity, does not itself impose any legal obligation on the State concerning the level or funding of retiree health care benefits. Nor does it express a preference for or prescribe the timing or the method of financing retiree health care benefits. The creation of an irrevocable trust to fund retiree health care benefits could be part of a contractual undertaking of the State to provide those benefits. If the trust fund consisted in part of employee contributions, there may be a stronger argument that the State had undertaken to devote the funds in the trust to retiree health care benefits.

90 *Opinions of the Attorney General* 195  
December 16, 2005

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## ADVICE LETTERS

### ATTORNEY GENERAL – STATE AGENCY REPRESENTATION

**Question:** Given the scope of the Attorney General's constitutional and statutory control over representation of State agencies, is the Maryland Stadium Authority's ("MSA") general statutory authorization to engage private counsel subject to the Attorney General's control with respect to representation of MSA, particularly with respect to potential litigation?

**Answer:** Yes. The Maryland Stadium Authority may not engage private counsel for litigation purposes without the approval of the Attorney General.

*Letter to  
Mr. Bruce A. Myers  
Legislative Auditor  
October 24, 2005*

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### COURTS – BOARD OF LAW EXAMINERS – ATTORNEYS – DISABLED PERSONS

**Question:** When the State Board of Law Examiners decides whether to grant test accommodations pursuant to the Americans With Disabilities Act of 1990 ("ADA") to a bar applicant, must the Board's procedures include a proceeding at which an applicant who has been denied test accommodations make an oral presentation to the Board?

**Answer:** No. The Board's current procedures provide an applicant with at least two opportunities to provide members of the Board with information and documentation in support of a request for accommodations and allow for review of an adverse decision. The Board is not required to provide an applicant with an opportunity for oral argument.

*Letter to  
Mr. Bedford T. Bentley, Jr.  
State Board of Law Examiners  
October 6, 2005*

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**GENERAL ASSEMBLY –  
UNCONSTITUTIONAL ENACTMENTS**

**Question:** Is an unconstitutional law passed by the General Assembly invalid? If so, would the Attorney General enforce an invalid law?

**Answer:** A statute that violates either the State or federal Constitution is invalid and unenforceable. However, even if invalid, laws remain in the Annotated Code until repealed by the General Assembly. It is generally the role of the courts to declare the act unconstitutional and void, the courts do so only if a case based on the invalid act is brought before them. While this Office sometimes advises affected State agencies not to implement or enforce provisions the Attorney General has concluded are unconstitutional, the opinion of the Attorney General that a statute is unconstitutional does not render the law inoperative or suspend its effectiveness.

*Letter to  
Delegate Donald H. Dwyer, Jr.  
October 26, 2005*

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**GOVERNOR – RECESS  
LIQUOR BOARD APPOINTMENTS**

**Question:** Were the Governor’s appointments of three members to the Board of License Commissioners of Baltimore City in July, 2005 valid?

**Answer:** Yes. The appointments were valid, pursuant to both Article 2B §15-101 of the Maryland Code governing recess appointments to local liquor boards and Article II, §11 of the Maryland Constitution regarding recess appointments.

*Letter to  
Senator George W. Della, Jr.  
December 29, 2005*

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**LOCAL GOVERNMENT –  
CONDOMINIUM CONVERSION**

**Question:** Does local authority restricting the conversion of apartment complexes to condominiums include the authority to require the approval of a certain percentage of residents in an apartment as a condition of conversion? May the State enact legislation providing additional protection to renters facing the conversion of rental housing to condominium regimes?

**Answer:** The Maryland Condominium Act, Real Property Article, §§11-101, *et seq.* governs the creation, initial sale, management, and termination of condominium regimes. Among those provisions are requirements aimed at protecting renters of apartments that are to be converted to condominiums and granting rights to local government to protect the availability of rental housing. However, the Act does not grant tenants of an apartment building a right to block the conversion of the facility to a condominium regime. The Act allows a county or municipal corporation to declare a “rental housing emergency” in all or part of the jurisdiction caused by the conversion to condominiums, and the local government by law or regulation may then extend rights applied to “designated households.” A developer of a condominium, however, is not required to set aside more than 20% of the units within a condominium for designated households. A charter county or municipal corporation may enact legislation granting renters additional protection from the conversion of rental housing to condominium regimes as long as the legislation is consistent with the Act and other provisions of State law. The General Assembly itself could enact legislation granting renters additional protection.

*Letter to  
Senator Ida G. Ruben  
November 10, 2005*

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**LOCAL GOVERNMENT –  
HOMEOWNERS PROPERTY TAX  
CREDITS PROGRAMS**

**Question:** Do local jurisdictions have authority to implement a homeowner’s property tax credit program for low-income and elderly homeowners who have experienced large assessment increases?

**Answer:** Yes.

*Letter to  
Delegate Peter A. Hammen  
November 3, 2005*

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**MALPRACTICE INSURANCE  
INSURANCE – STATUTORY CONSTRUCTION**

**Question 1:** In implementing the law that created a State subsidy of medical malpractice insurance premiums for the four-year period 2005 through 2008, Annotated Code of Maryland, Insurance Article (“IN”), §19-801 *et seq.*, did the MIA use the correct methodology for computing the subsidy factor under the statute for 2006?

**Answer:** Yes.

**Question 2:** Does MIA have authority under the statute to limit the amount of the subsidy if, as appears to be the case, the computation of the subsidy factor would result in some health care providers paying lower premiums in 2006 than they paid in prior years?

**Answer:** No.

*Letter to  
Lester C. Schott  
Maryland Insurance Administration  
October 31, 2005*

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**MUNICIPAL PARKING CITATIONS**

**Question:** Does the City of Annapolis have the authority to administratively adjudicate parking tickets as a civil matter?

**Answer:** No. While municipal corporations have the authority to regulate parking, parking violations are criminal offenses, and thus only the State’s Attorney or its authorized representative may decide whether to enforce a traffic or parking citation once issued, or to prosecute the criminal offense. Moreover, because the District Court has exclusive jurisdiction over the violation of local parking ordinances, a municipal corporation may not provide for the civil or administrative adjudication of such violations.

*Letter to  
Senator John C. Astle  
October 17, 2005*

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**MUNICIPALITIES – LAW  
ENFORCEMENT OFFICERS – SHERIFFS**

**Question:** May the Town of Oakland enforce its own ordinances on parkland it owns in another municipality?

**Answer:** Both municipalities have concurrent jurisdiction in the park, which may be best addressed by a mutual aid agreement between the two towns.

*Letter to  
Delegate George C. Edwards  
October 21, 2005*

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**PHYSICIANS – SELF-REFERRAL**

**Question:** You have asked whether two scenarios involving arrangements between physicians and pathologists violate the State and federal restrictions on physician self-referral, the State law on payment of money for referrals or the State law on reporting of lab costs that are passed through to patients?

**Answer:** First scenario: A urology group sets up a small histology laboratory and contracts with an independent pathology group to staff the laboratory and produce histology slides (“technical component” of the pathologic examination) and

provides a pathologic diagnosis (“professional component”) on the slides. The urology group bills the patient for the technical component, and the pathology group bills the patient for the professional component. This arrangement would not fall within the several exceptions to the Maryland’s self-referral law (Health Occupations Article, §1-302) which generally prohibits a health care practitioner from referring a patient to a health care entity in which the health care practitioner or member of the practitioner’s immediate family has a beneficial interest. It would also violate the federal self-referral law.

Second scenario: The urology practice sends samples to an independent pathology lab which performs the technical component of the pathologic examination, sends the slides to the urology group and bills the patient separately. Here no self-referral problems arise unless the urology group pays the pathologist less than the standard diagnostic rate a violation of Maryland’s self-referral law would occur. Such an arrangement would also violate the federal self-referral statute and this scenario could also violate Maryland’s fee-splitting statute fee statute and laboratory fee statute.

*Letter to  
Delegate Peter A. Hammen  
December 9, 2005*

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#### TAXATION – PROPERTY TAX

**Question:** Would a property tax credit authorized for a designated arts and entertainment district apply to newly constructed buildings?

**Answer:** Yes.

*Letter to  
Senator Ida G. Ruben  
October 3, 2005*

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#### ZONING AND PLANNING COMMISSIONER COUNTIES

**Question:** Can the Board of County Commissioners of Calvert County appeal a decision of the County Planning Commission to the circuit court?

**Answer:** Yes.

*Letter to  
Emanuel Demedis, Esquire  
County Attorney for Calvert County  
December 12, 2005*

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