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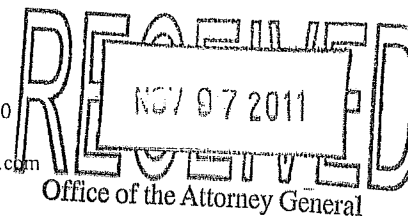

November 3, 2011

VIA FIRST CLASS MAIL

Robert N. McDonald, Esquire
Office of the Attorney General of Maryland
Chief Counsel, Opinions, Advice, and Legislation Division
200 Saint Paul Place
Baltimore, Maryland 21201

Re: Request for Formal Opinion Regarding COMAR 13A.07.05.01

Dear Mr. McDonald:

This firm serves as legal counsel to the Board of Education of Saint Mary's County (the "Board"). In that regard, I am writing on behalf of the Board and Dr. Michael J. Martirano, superintendent of St. Mary's County Public Schools (the "Superintendent"), to request a formal opinion regarding the continued validity and constitutionality of COMAR 13A.07.05.01. This provision purports to require local boards of education in Maryland to "develop and implement plans and procedures" to attain "racial balance at the various levels" of their respective school systems reflective of the racial composition of their respective jurisdictions. The regulation further requires the Maryland State Department of Education ("MSDE") to "require and review reports from local boards on the implementation of this regulation."

On its face, COMAR 13A.07.05.01 seems to be limited to the single submission of such plans and procedures on or before January 1, 1971 without any continuing requirement to submit plans in subsequent years. However, the regulation remains on the books, and the St. Mary's County Branch of the National Association for the Advancement of Colored People ("NAACP") recently submitted a complaint with the Board and the Superintendent alleging non-compliance with the regulation.[1] Although the Board and the Superintendent take seriously their continued efforts to recruit qualified minority candidates for employment at all levels, they take the position that the provisions of COMAR 13A.07.05.01 are no longer applicable and are, in fact, unconstitutional for the reasons discussed below.[2]

Because this is such an important topic to the Board, the Superintendent, and to the community they serve, and because the Board and the Superintendent seek to operate in full compliance with the law, they seek a formal opinion of the Attorney General as to the continued validity of COMAR 13A.07.05.01 and of any plan requiring the use of racial balancing in the hiring process for Maryland public schools. To that end, and in an effort to explain our position, I have set forth below our analysis of the background and the applicable law.

I. COMAR 13A.07.05.01 AND THE CONTEXT IN WHICH IT WAS PROMULGATED

COMAR 13A.07.05.01, broken into its constituent parts, is contained within Title 13A (entitled "State Board of Education"), Subtitle 7 (entitled "School Personnel"), Chapter 5 (entitled "Assignment of Personnel"), Regulation 1 (entitled "Integration"), and provides in its entirety:

> Local boards of education shall develop and implement plans and procedures for the attainment of racial balance at the various levels of the public school system, reflective of the composition of the population of their respective jurisdictions. These plans and procedures shall apply to the hiring, placing, and promotion of all personnel employed at the various levels of the school system. The plans and procedures provided in this regulation shall be submitted to the State Department of Education by January 1, 1971. The Department shall also require and review reports from local boards on the implementation of this regulation.

Because the historical and legal context in which this regulation was promulgated is relevant to the analysis of its constitutionality, a brief summary of that context follows.[3]

[1] *See* OCTOBER 26, 2011 COMPLAINT FROM THE ST. MARY'S COUNTY BRANCH OF THE NAACP TO THE BOARD AND DR. MICHAEL J. MARTIRANO, attached hereto as **Exhibit 1**.

[2] *See* NOVEMBER 3, 2011 LETTER FROM DR. MICHAEL J. MARTIRANO TO WAYNE M. SCRIBER, PRESIDENT OF THE ST. MARY'S COUNTY BRANCH OF THE NAACP, attached hereto as **Exhibit 2**.

[3] *See* Administrative History of COMAR 13A.073.05.01. There is no dispute as to the Board's compliance with the regulatory mandate in 1971.

In one of the most famous and important legal opinions of the past century, the Supreme Court declared in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) ("*Brown I*") that "in the field of public education the doctrine of 'separate but equal' has no place," and thus that *de jure* segregation of public schools on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[4] In so doing, the Court reversed its holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which held that equality of treatment is afforded when persons of different races are provided substantially equal facilities even though those facilities are separate. Notably, the *Brown I* Court did not provide specific guidance on the means by which desegregation was to be accomplished, nor did the Court provide such guidance when it reheard the matter a year later. *See Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) ("*Brown II*"). Instead, the *Brown II* Court merely and famously opined that desegregation should be accomplished "with all deliberate speed." *Id.* at 301.

Maryland was one of the states which, prior to the Court's decisions in *Brown I* and *Brown II*, adhered to *de jure* segregation. *See* Md. Code Ann., Art. 77, §§ 124, 207-09, and 269 (1951 ed.). In 1955, following the Court's decision in *Brown II*, the Attorney General of Maryland issued an opinion that Maryland laws providing for segregation in the public schools were unconstitutional. Subsequently, on June 22, 1955, the Maryland State Board of Education adopted a joint resolution with the Board of Trustees of the State Teachers' Colleges of Maryland recognizing that the Courts' decisions "automatically abolished all State laws 'which raised any distinction according to race in the public school system of the state of Maryland and of its local subdivisions.'" *Robinson v. Bd. of Educ. of St. Mary's County*, 143 F. Supp. 481, 485, 488 (D. Md. 1956) (noting that "both the Maryland State Board and the St. Mary's County Board have accepted without question the constitutional principles announced by the Supreme Court").[5] Only one Maryland public school system was subject to a court-ordered desegregation plan, *see Vaughns v. Bd. of Educ. of Prince George's County*, 355 F. Supp. 1034 (D. Md. 1972), and that matter has since been resolved, *see Vaughns v. Bd. of Educ. of Prince George's County*, 18 F. Supp. 2d 569 (D. Md. 1998).

[4] The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[5] Of interest, the Court in *Robinson* went on to express the following finding regarding the Board of Education of St. Mary's County's early efforts to comply with *Brown I* and *Brown II*:

> St. Mary's County is the southernmost county in Southern Maryland, agricultural, slow to change. Its traditional pattern has been disturbed during the past fifteen years by the establishment of the Patuxent Naval Base. Serious problems exist with respect to school facilities and transportation. The appointment of the Citizens' Committee in the summer of 1955 and it conscientious study of the problems during the past school year constituted a prompt and reasonable start toward compliance with the Supreme Court's ruling.

143 F. Supp. at 492.

Notably, only a few years after *Brown II*, the United States Court of Appeals for the Fourth Circuit found that the Board of Education of St. Mary's County's efforts to desegregate its school system appeared to be proceeding "with more than 'deliberate speed.'" *See Bd. of Educ. of St. Mary's County v. Groves*, 261 F.2d 527, 529 (4th Cir. 1958). St. Mary's County's progress notwithstanding, problems continued elsewhere. Over the ensuing decade, "many difficulties were encountered in [the] implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13 (1971). Indeed, during the first ten to fifteen years after its issuance, the *Brown II* Court's directive that desegregation of the public schools be accomplished with all deliberate speed, in many school districts, "essentially meant with little speed or urgency at all." *See* Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 731 (2010) (citing authorities documenting "miniscule desegregation progress made in first ten years after *Brown*").

Exasperated with the lack of progress made in some school systems that had historically been segregated by race,[6] the Supreme Court in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) struck down an ineffective "freedom of choice" plan[7] employed by a Virginia school system as a mere "deliberate perpetuation of the unconstitutional dual system" which existed prior to *Brown I*, and in remarkably forthright fashion stated:

> School boards such as the respondent then operating state-compelled dual systems were [] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.
>
> In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. The time for mere "deliberate speed" has run out; the

[6] *See Swann*, 402 U.S. at 13 (stating that, "[b]y the time the Court considered *Green* . . . in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws").

[7] The "freedom of choice" plan at issue—which was only enacted after suit for injunctive relief was filed and in an effort to remain eligible for federal financial aid—essentially allowed students to choose which of the two combined elementary/secondary schools in the county they wished to attend. *Green*, 391 U.S. at 433-34. After three years of operation, not a single Caucasian child chose to attend the high school which had formerly been designated for African American students, and although some African American students had enrolled in the school formerly designated for Caucasian students, eighty-five percent of African American children in the school system still attended the all-African American school, thus evidencing that "the school system remain[ed] a dual system." *Id.* at 441.

> context in which we must interpret and apply th[e] language of *Brown II* to plans for desegregation has been significantly altered. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

Id. at 437-39 (emphasis in original) (internal citations and quotation marks omitted).

In that same year, the Supreme Court affirmed a school system's use of "fixed mathematical" racial formulas as a means of accomplishing the goal of a unitary system as mandated by *Green*. *See United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969). In *Montgomery*, African American students and their parents brought suit against the Montgomery County, Alabama school system on the grounds that it had not taken any voluntary efforts to integrate since *Brown I*. 395 U.S. at 228. The record produced at trial indicated that the plaintiffs' contentions were true, and that not only was the school system segregated by race with respect to the student body, but that teachers were also assigned according to race. *Id.* at 228-29. Consequently, the trial court issued an order which provided that the school board move toward a goal whereby "in each school the ratio of [Caucasian] to [African American] faculty members is substantially the same as it is throughout the system." *Id.* at 232. To that end, the trial court established a ratio requiring at least one African American faculty member for every six Caucasian faculty members at each school within the system. *Id.* at 233.

On appeal, the Court of Appeals for the Fifth Circuit struck down parts of the district court's order which it viewed as requiring "fixed mathematical" ratios, opting instead to modify the order to require only "substantially or approximately" the ratio required by the district court's order. *Id.* at 234. Noting faculty and staff desegregation as "a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination," the Supreme Court reversed the Fifth Circuit and affirmed the district court's race-based fixed mathematical ratio with regard to personnel. *Id.* at 231-32; 237. In so doing, the Court reasoned:

> [The district court's order] was adopted in the spirit of this Court's opinion in *Green* . . . in that [its] plan "promises realistically to work, and promises realistically to work *now*." The modification ordered by the [Fifth Circuit], while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope.

Id. at 235.

It was in this context that the Maryland State Board of Education promulgated COMAR 13A.07.05.01. In *Vaughns v. Bd. of Educ. of Prince George's County*, 742 F. Supp. 1275, 1278 (D. Md. 1990), Judge Kaufman provided the following historical explanation:

> In the late 1960's and the early 1970's, public education in the State of Maryland came under scrutiny by the Office of Civil Rights of the U.S. Department of Health, Education and Welfare (HEW). In 1971, the Maryland State Board of Education promulgated a policy which required local boards of education to develop and implement plans and procedures for the attainment of racial balance in the public school systems. FN8 According to the State directive:
>
> Local boards of education shall develop and implement plans and procedures for the attainment of racial balance at the various levels of the public school system, reflective of the composition of the population of their respective jurisdictions. These plans and procedures shall apply to the hiring, placing, and promotion of all personnel employed at the various levels of the school system . . . .

Id. at 1278.[8]

II. The Evolution of Affirmative Action in Public Education

In 1971, the same year as the State Board's promulgation of COMAR 13A.07.05.01, the Supreme Court again considered in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22 (1971) to what extent racial quotas could be used as means to remediate the effects of *de jure* racial segregation in public schools. In considering the Charlotte school board's faculty and student integration plan, which was created in response to a district court decree and included the use of prescribed racial ratios, the Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of [African Americans] to [Caucasian] students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, that would not be within the authority of a federal court.

Id. at 16.

Although the Court acknowledged that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole," the Court, citing *Green*, reiterated that "a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness." *Id.* at 24-25. As such, the Court held that the "very limited use made of

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[8] Footnote 8 of Judge Kaufman's opinion provided as follows: "COMAR 13A.07.05.01. In a nonevidentiary hearing held in open court in this case on June 19, 1989, the parties agreed that the state regulation was issued, in part, as a response to 'pressure' from HEW to cure past racial segregation in the public schools, including discrimination in faculty hiring and assignment."

mathematical ratios was within the equitable remedial discretion of the district court" insofar as the use of such ratios was "no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." *Id.* at 25. In so doing, the Court reaffirmed the constitutionality of race-based quotas in the public education context.

A mere seven years after *Swann* was decided, however, the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) issued an opinion which, although involving a slightly different context, nevertheless implicated the constitutionality of racial quotas in general.[9] At issue in *Bakke* was the constitutionality of the admissions process at the Medical School of the University of California at Davis, which reserved sixteen seats out of a total of one hundred for members of "minority groups," which the Medical School identified as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.* at 274-76. Admissions standards for such "minority groups" were lower than for non-minority groups, and Allan Bakke, a Caucasian male applicant, was rejected for admission despite having "significantly" higher benchmark scores than minority students who were admitted. *Id.* at 275-77. The Court rejected the University's racial quota system as unconstitutional for several reasons.

As an initial matter, the Court rejected the University's position that Caucasians are not a "discrete and insular minority" such that discrimination against them deserved less scrutiny even though the alleged purpose of such discrimination was "benign." *Id.* at 290, 294-95. Instead, the Court explained that because "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality[,] . . . [r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 290-91.[10]

Applying that strict scrutiny, the Court rejected the University's special admissions policy's stated purposes, namely (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," (2) "countering the effects of societal discrimination," and (3) "obtaining the educational benefits that flow from an ethnically diverse student body." *Id.* at 305-319. With regard to the first purpose, the Court stated:

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[9] It should be noted that *Bakke* was distinguishable from the school desegregation cases in that *Bakke* involved an institution of higher education and did not involve "remedies for clearly determined constitutional violations." *Bakke*, 438 U.S. at 300. Nevertheless, the *Bakke* Court's opinion is still highly relevant with regard to the strict scrutiny analysis discussed *supra*.

[10] The Court further explained that, although the Fourteenth Amendment was enacted for the "one pervading purpose" of protecting "the freedom of the slave race [i.e., African Americans], the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him[,] . . . [a]s the Nation filled with the stock of many lands, the reach of the [Equal Protection] Clause was gradually extended to all ethnic groups seeking protection from official discrimination" such that "[t]he guarantees of equal protection . . . are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality[.]" *Id.* at 291-92.

> If the [University's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Id. at 307.

With regard to the second purpose, the Court contrasted the instant case with the school desegregation cases where "the States were required by court order to redress the wrongs worked by specific instances of racial discrimination" and whose "goal was far more focused than the remedying of the effects of "societal discrimination." *Id.*[11] Lastly, with regard to the third goal, the Court explained that, although "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education[,] . . . [e]thnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.* at 311-12, 314. Thus, the Court explained, because the special admissions program focused solely on race, it "would hinder rather than further attainment of genuine diversity." *Id.* at 315.[12]

Nearly a decade later in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court rejected a race-conscious layoff provision which favored African-Americans for the purpose of "remedy[ing] societal discrimination by providing 'role models' for minority schoolchildren." *Id.* at 272-73. In that case, the district court and Sixth Circuit held that the use of racial preferences did not need to be grounded on a finding of prior discrimination, but that the "need for more minority faculty role models" as determined "by finding that the percentage of minority teachers was less than the percentage of minority students" was sufficient. *Id.* at 272-74. The Supreme Court reversed, noting that "[t]his Court never has held that societal

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[11] The Court further explained:

> The purpose of helping certain groups whom the [University] perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like [Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved fro violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

Id. at 310.

[12] The Court opined that a more effective means of achieving true diversity was to recognize race or ethnic background as a "plus" in a particular applicant's file, yet not one that would "insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317.

discrimination alone is sufficient to justify a racial classification." *Id.* at 274. The Court further explained:

> Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown* [*I*].
>
> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications. No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absences of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.
>
> *Id.* at 276.

Lastly, the Court held that even if a race-conscious hiring plan with regard to public school personnel was a compelling state interest,[13] the use of quotas was not sufficiently narrowly tailored because other, less intrusive means of accomplishing that goal—such as the adoption of hiring goals—were available. *Id.* at 283-84. Several years later, in *Freeman v. Pitts*, 503 U.S. 467 (1992), the Court further discussed the exceptionally narrow instances in which rigid race-based means could be utilized to remedy the effects of *de jure* segregation. Within the context of determining when a judicial desegregation decree could be extinguished, the Court stated:

> That there was racial imbalance . . . was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.

[13] The Court explained that it did not need to consider whether the school system produced sufficient evidence of prior discrimination because the school system's plan "was not a legally appropriate means of achieving even a compelling purpose." *Id.* at 277-78.

* * *

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. . . .
>
> In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. 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. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.
>
> As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.

Id. at 494-96 (internal citations omitted).[14]

III. More Recent Supreme Court Jurisprudence Suggesting the Unconstitutionality of COMAR 13A.07.05.01

Recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Court held that two school systems which administered policies which classified their students by race for purposes of making decisions regarding school assignments violated the equal protection rights of their students. The Court began its analysis by reiterating that race-based policies administered by government are subject to strict scrutiny whereby the governmental entity must demonstrate that the use of race is "narrowly tailored" to achieve a compelling governmental interest. *Id.* at 720. To that end, the Court noted that, in its prior cases evaluating the use of racial classification in the school context, it has recognized two interests

[14] Moreover, the Court has noted, albeit not in an equal protection case but one based on a race discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1220e *et seq.*, that the proper comparison for determining the existence of actual discrimination by a school system in hiring practices is not between the racial composition of the personnel and the racial composition of the relevant community at large; rather, the proper comparison is "between the racial composition of [the school system's personnel] and the racial composition of the qualified [personnel] population in the relevant labor market." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977).

that qualify as compelling: (1) remedying the effects of past intentional discrimination, and (2) promoting diversity in higher education. *Id.* at 720-722.[15]

Noting that the latter interest does not apply in the elementary and secondary public school context, the Court rejected the school system's argument that racial balancing was a compelling governmental interest, stating:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class. Allowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved. An interest linked to nothing other than proportional representation of various races would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the program continues to reflect that mixture.

Id. at 730-31 (internal citations and quotation marks omitted).[16]

Moreover, noting that "[n]arrow tailoring requires serious, good faith consideration of workable race-neutral alternatives," the Court held that the transfer plans at issue were not sufficiently narrowly tailored because the school systems "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals." *Id.* at 735.[17] In

[15] With respect to the former, the Court reiterated that "the Constitution is not violated by racial imbalance in the schools, without more," and that once a school system has achieved unitary status and thereby remedied prior *de jure* segregation, "[a]ny continued use of race must be justified on some other basis." *Id.* at 721; *see also id.* at 755 (Thomas, J., concurring) (explaining that, "for a government unit to remedy past discrimination for which it was responsible, the Court has required it to demonstrate 'a strong basis in evidence for its conclusion that remedial action was necessary'") (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). With respect to the latter, the Court noted that the "diversity interest was not focused on race alone but encompassed 'all factors that may contribute to student body diversity.'" *Id.* at 722 (quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003) (citing travel experience, foreign language fluency, accomplishment despite personal adversity and family hardship, exceptional records of extensive community service, and successful careers in other fields as "possible bases for diversity admissions")).

[16] Only a plurality of the Court (as contrasted with a majority) signed on to this portion of the opinion. Consequently, the conclusion that racial classification does not constitute a compelling governmental interest, although persuasive, is not absolutely binding on lower courts at this time.

[17] In his concurring opinion, Justice Thomas, citing *Wygant* among other cases for support, asserted:

concluding its analysis, the Court expressed the following reasoning in an attempt to bring the cases on desegregation of the public schools full circle:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again--even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way to achieve a system of determining admission to the public schools on a nonracial basis . . . is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

Id. at 747-48 (internal citation and quotation marks omitted).

IV. THE BOARD'S ANALYSIS

Because all of Maryland's public school systems were racially segregated by state law prior to the Supreme Court's decision in *Brown I*, those school systems—and by extension the Maryland State Board of Education—had an affirmative duty to take the necessary steps to remedy the effects of that discrimination. Given the context in which COMAR 13A.07.05.01 was promulgated, it may be reasonably understood as a good faith effort on the part of the Maryland State Board of Education to ensure that Maryland school systems complied with then-prevailing jurisprudence which required school systems to take strong and decisive affirmative action to achieve unitary systems. Indeed, given the Supreme Court's contemporaneous holdings in *Green*, *Montgomery*, and *Swann*, the State Board of Education would have been well-justified in believing that its efforts were both required and constitutional.

It is clear, however, that given its classification based upon race, COMAR 13A.07.05.01 is subject to strict scrutiny. *Parents Involved*, 551 U.S. at 720. As such, if this regulation has continued validity, the Maryland State Board of Education and each constituent school system will be required to demonstrate that the use of racial balancing is "narrowly tailored" to achieve a compelling governmental interest. *Id.* Although remedying the effects of past *de jure* discrimination has been recognized as a compelling governmental interest, *id.*, "a strong basis in evidence" is required to support the "conclusion that remedial action [is] necessary." *Croson*, 468 U.S. at 500. To this end, the fact that a discrepancy may exist between the ratio of minority

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> [S]chool boards have no interest in remedying the sundry consequences of prior segregation unrelated to schooling, such as housing patterns, employment practices, economic conditions, and social attitudes. General claims that past school segregation affected such varied societal trends are too amorphous a basis for imposing a racially classified remedy because it is sheer speculation how decades-past segregation in the school system might have affected these trends.

Id. at 760 (Thomas, J., concurring) (citations and internal quotation marks omitted).

teachers in a school system and the overall minority population residing in that school system's jurisdiction does not lead to the conclusion that such disparity is a vestige of prior *de jure* discrimination. *See Wygant*, 476 U.S. at 276 (explaining that "[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind").

Importantly, "the Constitution is not violated by racial imbalance in the schools, without more." *Parents Involved*, 551 U.S. at 721. Thus, "[a]s the *de jure* violation becomes more remote in time and [] demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith." *Freeman*, 503 U.S. at 496. Given the length of time since the demise of state-mandated segregation in Maryland school systems and the subsequent good faith efforts of those school systems, in particular in St. Mary's County, to achieve unitary systems, it is unlikely that COMAR 13A.07.05.01 is supported by a compelling governmental interest.

Moreover, even assuming that there is a compelling governmental interest which justifies the implementation of COMAR 13A.07.05.01, it is very unlikely that COMAR 13A.07.05.01 would be construed as narrowly tailored given its sole focus on race. Indeed, in order for a school system to comply with COMAR 13A.07.05.01 and not commit a constitutional violation, that school system would have to prove that it had seriously considered less intrusive or race-neutral alternatives and found them to be inadequate such that implementation of COMAR 13A.07.05.01 was necessary "as a last resort." *Parents Involved*, 551 U.S. at 735. Given that absolute equality between a jurisdiction's racial makeup and the make up of its public school employee population is not required, see *Wygant*, 476 U.S. at 276, it is unlikely that COMAR 13A.07.05.01 could legally be implemented, and the Board would likely face a serious challenge if it attempted to do so.

V. CONCLUSION

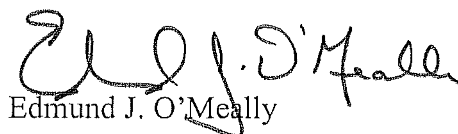
The Board and the Superintendent take seriously their obligations as equal opportunity employers and make serious efforts to recruit qualified minority candidates at all levels. The Board regularly recruits at Historically Black Colleges and has also hired a minority recruitment coordinator to assist the Board in its recruitment efforts. Despite these good faith efforts, the Board and the Superintendent take issue with the position of the NAACP that the provisions of COMAR 13A.07.05.01 purporting to require "plans and procedures for the attainment of racial balance . . . reflective of the composition of the population" presently apply beyond the initial reporting date of January 1, 1971. Moreover, for all of the reasons discussed above, the Board and the Superintendent take the position that any attempt to apply the provisions of COMAR 13A.07.05.01 to their hiring efforts would be unconstitutional in light of current Supreme Court interpretations.

Obviously, this is a tremendously important issue for the Board, the Superintendent, and for the entire St. Mary's County community. The Board and the Superintendent wish to conduct

all of their operations, including their employment practices, in full compliance with the law. Accordingly, a formal opinion from the Attorney General is sought in an effort to determine the continued validity of COMAR 13A.07.05.01. Such an opinion will provide needed guidance not only to the Board of Education of St. Mary's County but to the other school systems across the State as well.

If you have any questions or if I can be of any assistance in this matter, please do not hesitate to contact me.

Very truly yours,



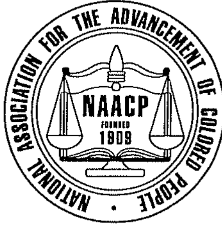
Edmund J. O'Meally

cc: Dr. Michael J. Martirano, Superintendent
Board of Education of St. Mary's County
Mr. Wayne M. Scriber, St. Mary's County Branch, NAACP
Dr. Bernard Sadusky, Interim State Superintendent
Elizabeth M. Kameen, Esquire, Principal Counsel MSDE

E Q U A L I T Y

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

D I G N I T Y



St. Mary's County Branch #7025
Post Office Box 189
Lexington Park, Maryland 20653
(301) 863 3011

Dr. Michael Martirano, Superintendent
St. Mary's County Board of Education
St. Mary's County Public Schools
23160 Moakley Street
Leonardtown, MD 20650

October 26, 2011

Dear Dr. Martirano and Board Members:

Please be advised that the St. Mary's County Branch of the NAACP is submitting a formal complaint in reference to non-compliance with the COMAR Integration Policy ***13A.07.05.01. 01***. We believe that this has resulted in the racial imbalance of professional and education support staff at all levels in the St. Mary's County Public School system. We are also addressing other areas of disparity that affect African American students and other minorities.

The attached documents specify the complaint, others issues and our positions in helping to resolve these issues. We look forward to your timely response in addressing our complaint and other issues in reference to equity and cultural diversity in St. Mary's County Public Schools.

Respectfully yours,

Wayne M. Scriber
President
St. Mary's County Branch
NAACP

cc: Maryland State Conference of NAACP
NAACP National Headquarters
Maryland State Board of Education
Maryland State Department of Education
Maryland Office of Civil Rights
U.S. Department of Education Office of Civil Rights
U.S. Representative
U.S. Senators
Maryland State Senator
Maryland State Delegates
St. Mary's County Commissioners
Chief Administrative Officer (SMCPS)
Chief Operating Officer (SMCPS)
Chief of Fiscal Services and Human Resources (SMCPS)
Directors (SMCPS)
Supervisors (SMCPS)
Principals (SMCPS)

St. Mary's County Branch, NAACP Formal Complaint to the St. Mary's County Board of Education and Superintendent Michael M. Martirano Executive Summary

Over the past four years, in an effort to move forward with the mission and vision of the National Association for the Advancement of Colored People (NAACP), the St. Mary's County branch has been working collaboratively with Dr. Michael Martirano and school system leaders to eliminate the Achievement GAP in the St. Mary's County Public Schools (SMCPS). The "achievement gap" refers to the observed disparity on a number of educational measures between the performance of groups of students, especially groups defined by gender/ race/ethnicity, disability, and socioeconomic status.

Across the nation the evidence for the gap has been documented repeatedly by the usual measures. These include drop-out rates, relative numbers of students who take the advanced placement classes and examinations, who are enrolled in the top academic and "gifted" classes and/or admitted to higher-status secondary schools, colleges, graduate, and professional programs. Last but not least, are the discrepancies in scores on standardized tests of academic achievement, on which teachers' and students' fate so heavily depend.

For example, in St. Mary's County, African American students score lower on state and national tests. More African American students drop out of school than whites. During the 2010 school year, 81.33% of the students graduated from Great Mills High School. However, just 75% of African American students graduated as compared to 85% of their white counterparts. The performance standard for making annual yearly progress in this area is 90%. In addition, only 69% of African American male students graduated this same year. This is unacceptable, considering the Maryland State Department of Education has given specific recommendations for accelerating African American male student achievement.

The suspension rate and arrest rate among African American students is higher, especially African American male students. Other areas of concern are the inconsistency in funds to sustain programs that impact African American/minority student achievement and their involvement or lack of involvement in these academic and extra-curricular programs. These programs are usually grant funded and when the grant funds discontinue, the system fails to provide the funds whether they are working or not. Parent involvement and engaging the community in public forums to identify and solve problems is critical in eliminating the achievement gap.

In SMCPS, major discrepancies exist in the numbers of African American/minority professional staff hired. In 2007, the minority professional staff represented six percent (6%) of the population. As of June, 13, 2011, nine percent (9%) of the SMCPS professional staff were minorities. At this time numbers may be lower. SMCPS has not achieved the target of twenty percent (20%) set by superintendent and is representative of the African American student population. African American students/ minority students lack adult role models and contact with teachers who understand their racial and cultural background.

While the number of minority students has increased in SMCPS, the number of minority staff has decreased over time. If SMCPS does not hire and retain more African American/minority teachers to represent the diversity in our schools, students who have approximately 40 teachers in the span of twelve years could have been taught by perhaps, two minority teachers. In 2010, seven African American teachers left the system. In 2011, 80 new teachers were hired and four were African American.

The St. Mary's County Public School System is not in full compliance with ***COMAR of 13A.07.05.01. 01 Integration***, which states that local boards of education shall develop and implement plans and procedures for the attainment of racial balance at the various levels of the public school system, reflective of the composition of the population of their respective jurisdictions. These plans and procedures shall apply to the hiring, placing, and promotion of all personnel employed at the various levels of the school system. The plans and procedures provided in this regulation shall be submitted to the State Department of Education. The Department shall also require and review reports from local boards on the implementation of this regulation.

Plans and procedures being implemented for the attainment of racial balance at various levels of the school system are ineffective in providing employees in the system that are reflective of the composition of the population of this jurisdiction as specified in ***COMAR 13A.07.05.01 Integration.***

We are very concerned about the education of our youth and believe that as a community, we must be vigilant in identifying why this is occurring in our schools and what we can do to work together to eliminate the achievement gap. We need your help in starting a process of community involvement to Speak Out for Students Success (SOSS) to eliminate the Achievement GAP and ensure the cultural diversity of public school employees at all levels. We are seeking advice and counsel at the local, state and national levels. Your support and counsel would be greatly appreciated.

In the attached formal complaint we are asking the Board of Education and the Superintendent to address specific issues , review NAACP positions on these issues and provide us with a timely response to inform us how they will be acting upon our concerns and requests.

For additional information contact:

Mr. Wayne M. Scriber
President
St. Mary's County Branch, NAACP
e-mail:

Dr. Janice T. Walthour
St. Mary's County Branch NAACP
Education Committee Chairperson
Contact: e-mail
Phone: 301-862-2296

NAACP St. Mary's County Branch #7025
Complaint to the St. Mary's County Public Schools' Superintendent and the Board of Education

The NAACP holds each individual member of the Board of Education, the Superintendent of schools, central office administrators and school principals accountable for full compliance with ***COMAR 13A.07.05.01 Integration*** through ensuring the development, implementation, and monitoring of plans and procedures that are effective in recruiting, hiring retaining, developing and promoting African Americans at all levels to reflect the 20% African American student population.

Complaint: Racial Imbalance of Professional and Education Support Staff

The St. Mary's County Public School System (SMCPS) is not in compliance with *COMAR of 13A.07.05.01. 01 Integration*, which states that local boards of education shall develop and implement plans and procedures for the attainment of racial balance at the various levels of the public school system, reflective of the composition of the population of their respective jurisdictions. These plans and procedures shall apply to the hiring, placing, and promotion of all personnel employed at the various levels of the school system. The plans and procedures provided in this regulation shall be submitted to the State Department of Education. The Department shall also require and review reports from local boards on the implementation of this regulation.

Issue: The racial imbalance of professional and education support staff at all levels in St. Mary's County Public Schools – During the 2010-2011 school year, Town Creek Elementary School did not have one minority on staff. There was a vacancy in 2009, but it was not filled with a minority.

In 2007 the minority professional staff represented six percent (6%) of the population. As of June 13, 2011, nine percent (9%) of the SMCPS professional staff were minorities. At this time numbers may be lower. SMCPS has not achieved the target of twenty percent (20%) set by the Superintendent. African American/minority students represent over 20% of the student population. <u>Plans and procedures being implemented for the attainment of racial balance at various levels of the school system are ineffective in providing the system with employees that are, at a minimum, reflective of the composition of the population of this jurisdiction as specified in *COMAR 13A.07.05.01 Integration.*</u>

Note: Various levels- Chief administrative officers, directors, supervisors, coordinators, principals, assistant principals (elementary, middle school, high school), teachers, resource teachers, counselors, paraprofessionals, secretaries, assistant secretaries, Division of Supporting Services supervisors, foreman etc.

Eliminating the Achievement Gap

Branch Goal: Protect the rights of all children in St. Mary's County to equal educational opportunities by holding the St. Mary's County Board of Education and the Superintendent accountable for promoting and providing **cultural diversity** in our school system and **ensuring equity for African American/minority students.**

Long Term Goals: to ensure equity **for African American/minority students. The following: areas are all issues of concern:**

- **racial balance of professional and education support personnel at all levels (COMAR13A.07.05.01)**
- **redistricting patterns**
- **graduation rates**
- **disciplinary actions**
- **African American male achievement (ETMA Compliance-See State Report)**
- **students enrolled in advanced placement classes, academies, the technical center, college/ post high school programs and extra-curricular activities in all schools**
- **funding for programs that impact minority student achievement**
- **parent & community involvement**

Position Statements

The St. Mary's County Branch the NAACP takes the following positions:

Statement A: The St. Mary's County Board of Education and Superintendent are not in compliance with *COMAR 13A.07.05.01 Integration*. To date, plans and procedures implemented have failed in providing racial balance among professional staff in the school system.

Statement B: Shared Responsibility- The issue of cultural diversity in our schools is a shared responsibility. It has been the #1 priority of two What Counts work sessions. This is an issue that must be studied and resolved by our entire community, not just NAACP advocates. Board policy clearly states the importance of community involvement. (Board Policy AB Stakeholders and their School System)

Notification of this complaint will be sent to the following:

cc: Maryland State Conference of NAACP
NAACP National Headquarters
Maryland State Board of Education
Maryland State Department of Education
Maryland Office of Civil Rights
U.S. Department of Education Office of Civil Rights
U.S. Representative
U.S. Senators
Maryland State Senator
Maryland State Delegates
St. Mary's County Commissioners
Chief Administrative Officer (SMCPS)
Chief Operating Officer (SMCPS)
Chief of Fiscal Services and Human Resources (SMCPS)
Directors (SMCPS)
Supervisors (SMCPS)
Principals (SMCPS)

Action Statements

Statement A: Urgent Actions- **Compliance with COMAR- To meet COMAR regulations of racial balance in public schools**

1. **We believe that the Superintendent should make compliance with this state law a top priority and fill all new and existing professional staff vacancies and promotions with African-American applicants who are qualifiable. This includes an expectation of increasing the current overall percentage of less than nine percent (9%) to a minimum of sixteen percent (16%) by the end of the 2011-2013 school years.**

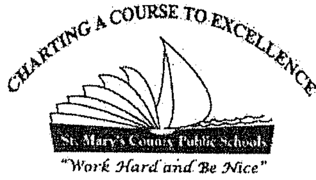
2. **We believe that the 2011-2012 recruitment plan should include numerical goals for recruiting and hiring African American professional staff from HBCUs and other institutions with high percentages of African American students. Emphasis should be on seeking African American candidates from rural areas similar to St. Mary's County. For example: The SMCPS Recruitment Plan includes a focus on visiting Historically Black Colleges and Universities (HBCUs) or consortiums that have schools from HBCUs. Norfolk State University was the only HBCU listed for a new hire on the 2010-2011 recruitment report.**

Statement B: Actions

1. **We believe that in keeping with the key responsibilities of the Board of Education to involve the community in the life of the school system, a standing advisory committee made up of NAACP representatives and other community stake holders (policy makers, military leaders, school system leaders, parents, students, community organizations, church/social justice leaders etc.) should be appointed. This racial/ethnic balanced committee will study diversity and equity areas identified by the NAACP; examine issues, report findings and make policy recommendations that include measurable accountability benchmarks to resolve all issues.**

2. **This committee should make recommendations that will positively impact this school year and the out years. In reference to the issue of racial imbalance, the committee should make recommendations within a four month timeframe to include committee appointments, the committee process and recommendations to the Board of Education to resolve this issue. Recommendations to include developing and implementing plans and procedures with numerical documentation that result in recruiting, hiring, retaining, developing and promoting African Americans at all levels to reflect the 20% African American student population by 2014.**

3. **In order to reach full compliance and sustainability, reports and plans such as the Bridge to Excellence plan which gives a listing of activities/programs to document Education that is Multicultural compliance, must include measures to determine the effectiveness of these activities/programs beyond state test scores. The results of these measures should be reported to the public.**



DR. MICHAEL J. MARTIRANO
Superintendent of Schools

St. Mary's County Public Schools

Central Administration
P.O. Box 641
23160 Moakley Street
Leonardtown, Maryland 20650
Phone: 301-475-5511, ext. 178
Fax: 301-475-4270

Board of Education
Dr. Salvatore L. Raspa, Chairman
Mrs. Marilyn A. Crosby, Vice Chairman
Mrs. Cathy Allen
Mr. William Brooke Matthews
Mrs. Mary M. Washington
Ms. Shannon Demehri, Student Member
Dr. Michael J. Martirano, Secretary/Treasurer

November 3, 2011

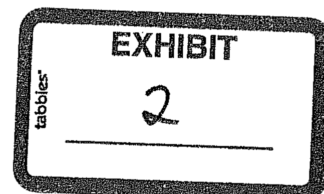
Mr. Wayne M. Scriber, President
National Association for the Advancement of Colored People
St. Mary's County Branch #7025
P.O. Box 189
Lexington Park, Maryland 20653

Re: Complaint regarding COMAR 13A.07.05.01

Dear Mr. Scriber:

I want to thank you and the other members of the St. Mary's County Branch of the NAACP for appearing at the Board of Education of St. Mary's County's meeting on October 26, 2011. As we discussed at the meeting, the Board and I are committed to continuing efforts in the recruitment of qualified minority candidates for employment at all levels of the school system. I am happy to say that since I became Superintendent, we have increased the percentage of minority professionals and now have minority professionals at every school in St. Mary's County. We all agree, however, that more needs to be done, and we have hired a minority recruitment coordinator to help us in that effort. As we discussed in the meeting, the effort to attract qualified candidates for employment to St. Mary's County -- both minority and non-minority alike -- requires collaboration at all levels of the community.

I also want to acknowledge the formal complaint that you delivered during the October 26, 2011, Board meeting. In that complaint, the St. Mary's County Branch of the NAACP contends that the Board of Education is not in compliance with the provision of COMAR 13A.07.05.01. As we discussed at the meeting, the Maryland State Department of Education has not required reporting from Maryland school systems for many years. We also have serious questions as to the continued validity of the regulation in question in light of recent Supreme Court decisions; however, we fully recognize the importance of the issue that you have raised in your complaint. To that end, we have sought a formal opinion from the Maryland Attorney General in an effort to obtain guidance on the issue. A copy of our counsel's letter to the Office of the Attorney General is attached for your review.



It is my hope that we will continue to work collaboratively in the process of seeking qualified candidates for employment with the St. Mary's County Public Schools. To that end, my door remains open to the members of the St. Mary's County Branch of the NAACP, as we continue our mutual efforts.

Sincerely,

Michael J. Martirano, Ed.D.
Superintendent of Schools

MJM:bad

Attachment

cc: Board of Education of St. Mary's County
Dr. Bernard Sadusky, Interim State Superintendent of Schools
Ms. Elizabeth M. Kameen, Esquire, Principal Counsel, MSDE
Mr. Edmund J. O'Meally, Esquire