TESTIMONY OF DAVID BURTON, JON GREENBAUM, AND MICHAEL JONES
IN SUPPORT OF HB 1260
MARYLAND HOUSE OF DELEGATES
APPROPRIATIONS COMMITTEE
FEBRUARY 25, 2020

Dear Chair McIntosh, Vice Chair Jackson, and Committee Members:

As the President of the lead Plaintiff (David Burton of the Coalition of Equity and Excellence in Maryland Higher Education) and co-lead counsel for Plaintiffs (Jon Greenbaum of the Lawyers' Committee for Civil Rights Under Law[1] and Michael Jones of Kirkland & Ellis LLP) in *Coalition of Equity and Excellence in Maryland Higher Education v. Maryland Higher Education Commission* (Maryland HBCU litigation), we are writing in support of HB 1260. This legislation would provide approximately $577 million of supplemental funding over the next ten years to Maryland's four Historically Black Colleges and Universities (HBIs or HBCUs), Bowie State University, Coppin State University, Morgan State University, and University of Maryland Eastern Shore contingent on a settlement in the Maryland HBCU litigation We are hopeful that if HB 1260 is enacted into law, Plaintiffs and the Attorney General will be able to resolve the Maryland HBCU litigation, remedy the violation of the Equal Protection Clause of the United States Constitution found by Judge Blake, and enable the HBCUs to be comparable and competitive with Maryland Traditionally White Institutions (TWIs). As discussed more fully below, we suggest some amendments to the legislation that we believe will improve the legislation and increase the likelihood of resolving the Maryland HBCU litigation.

BACKGROUND OF THE MARYLAND HBCU LITIGATION

Plaintiffs welcome the Maryland General Assembly's efforts to bring this protracted federal case to settlement. There have been four unsuccessful court-supervised mediation efforts in this case: in 2011, before the trial on liability; in 2013-2016, after Plaintiffs prevailed on liability and before the remedial trial; in 2018, before the appellate argument before the Fourth Circuit Court of Appeals; and in 2019, after the Fourth Circuit Court of Appeals ordered the parties to mediation after argument, which is highly unusual. Plaintiffs have found mediation futile. Though the parties cannot discuss the substance of mediation, it is worth noting that the Governor's last public statement regarding settlement was for $200 million, a grossly inadequate amount. While the Governor's spokesman claims that "[n]o one is more committed to resolving this issue than Governor Hogan," [2] the General Assembly can put that statement to the test by putting HB 1260 on his desk.

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[1] The Lawyers' Committee for Civil Rights Under Law engages the resources of the private bar to provide pro bono representation in a wide range of civil rights cases, such as discrimination in education, housing, and voting. It celebrated its 50th Anniversary in 2013, when President Obama and Attorney General Eric Holder welcomed the group at the White House to reiterate President John F. Kennedy's call to the private bar in 1963 to help in the fight for civil rights.

[2] Pamela Wood, Maryland Speaker's Legislation would force settlement of long-running HBCU lawsuit," Baltimore Sun (February 7, 2020), https://www.baltimoresun.com/politics/bs-md-pol-ga-jones-hbcu-20200207-w3texslranentifvicp4f4esne-story.html.

The Maryland HBCU litigation was initially filed in 2006. In 2013, after a six-week liability trial, United States District Court Judge Catherine C. Blake ruled in favor of the Coalition and HBCU students and alums and against the State, noting that "[a]s the parties involved in this long-running litigation agree, Maryland had a shameful history of *de jure* segregation throughout much of the past century. Public higher education opportunities for African Americans were either non-existent or decidedly inferior to the opportunities afforded to white citizens. Most of that history . . . is neither disputed nor excused by the State in this case."[3] Indeed, the State's own documents show that it deliberately set up its four black schools to be "inferior in every aspect of their operation." And as the court noted, Maryland's own reports show that "the contrast between the amounts of money received by the two racial groups would show, if possible, of computation, an enormous differential in favor of the white race."[4] In particular, Judge Blake found the State liable for the 10:1 disparity in unique, high demand programs between the State's HBCUs and its TWIs, and the unnecessary duplication of HBCU programs.[5] She found that the State's failure to dismantle the programmatic disparity between HBCUs and TWIs – which was traceable to the era of *de jure* segregation – violated the Equal Protection Clause of the United States Constitution.

In 2017, after a seven-week remedial trial, Judge Blake created a framework for remedying the Constitutional violation.[6] "The court conclude[d] that creating new unique, high-demand programs at the HBIs will achieve the greatest possible reduction in the segregative effects of unnecessary program duplication in Maryland's institutions of higher education."[7] In addition to the cost of creating of new programs and enhancing existing programs, the court also "require[d] the State to provide funding to the HBIs for student recruitment, financial aid, and marketing."[8]

With respect to the cost of remedy, Judge Blake did not provide a specific amount but left that for a special master who would recommend an amount. The special master has not been appointed because the case is on appeal. Plaintiffs did not provide a specific total dollar to Judge Blake. The State has been all over the place regarding the cost of a remedy. During the remedial trial, the State argued that Plaintiffs' proposed remedy, which to a significant degree was the remedy ordered by Judge Blake, would cost $1.9 billion in operating costs over ten years.[9] At other times, the State has stated that a remedy would cost more than a billion dollars. This is in contrast to the Governor's "last and final" settlement offer of $200 million.

We think an appropriate remedial amount is in between the high and low numbers offered previously by the State. Last fall, when we wrote the Legislative Black Caucus, we suggested a settlement amount, of $577 million in today's dollars, spread over a reasonable time period. In doing so, we looked to the settlement of the Mississippi HBCU litigation. Notably, Judge Blake concluded that Maryland was as bad as, if not worse than Mississippi of the 1970's and 1980s in

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[3] *Coalition of Equity and Excellence in Maryland Higher Education v. Maryland Higher Education Commission* (Liability Decision), 977 F. Supp. 2d 507, 511-12 (D. Md. 2013).
[4] *Id.* at 514.
[5] *Id.* at 536-37.
[6] *Coalition of Equity and Excellence in Maryland Higher Education v. Maryland Higher Education Commission*, 295 F. Supp. 3d 540 (D. Md. 2017) (Remedial Decision).
[7] *Id.* at 582.
[8] *Id.* at 585.
[9] *Id.* at 570.

terms of its programmatic disparity. [10] Almost twenty years ago, Mississippi, a much poorer state than Maryland, settled its HBCU case for $516.98 million dollars for 3 HBCUs. Adjusting for inflation, the Mississippi settlement is approximately $791 million in today's dollars. Further adjusting for four schools rather than three, the figure would be $1.05 billion dollars.

As discussed by our expert Walter Allen, a settlement fund of $577 million would allow the HBCUs to develop and launch a number of new, independent academic programs of the kind the State promised to provide in its 2000 Agreement with the Office of Civil Rights and which Judge Blake ordered, as well as to enhance existing programs. This would allow the schools to hire quality faculty to run the programs. In addition, these funds would be used to provide scholarships that would enable the HBCUs to better compete for students and provide for substantial rebranding to offset the State's decades of stigmatization of the HBCUs.

PLAINTIFFS' SUPPORT OF HB 1260 WITH SUGGESTED AMENDMENTS

HB 1260 provides the funding and the framework for settlement. To begin with, HB 1260 includes a settlement fund of $577 million over ten years. We note that HB 1260 includes attorneys' fees in the $577 million settlement fund, as opposed to the attorneys' fees being in addition to the $577 million,[11] and the fund does not account for inflation. As a result, the settlement is valued at around $500 million in today's dollars. Though Plaintiffs believe that $577 million in current dollars would better enable to the HBCUs to be comparable and competitive with the TWIs, this difference is not a deal breaker.

Furthermore, we agree with the designation of settlement funds Not just for the creation, implementation, expansion, and improvement of academic programs but for scholarships and student financial aid, faculty recruitment and development, academic support, and marketing. This is consistent with Plaintiffs' remedial proposal and Judge Blake's Remedial Decision.

We have some suggested amendments. The first two relate to the allocation of the funds among the four schools. The current allocation in HB 1260 is based solely on annual enrollment and it adjusts every year based on enrollment. We believe the allocation set forth in Senate Bill 856 is preferred because it guarantees each HBCU at least $10 million per year; Senate Bill 856 takes into account not only enrollment but research classification of each school; and Senate Bill 856 gives each HBCU a set distribution that enables for better planning and does not fluctuate with enrollment. We believe a year to year allocation based on enrollment makes planning for the development of academic programs very difficult, without knowing the amount of funding and

[10] Liability Decision, 977 F. Supp, 3d at 536-37.

[11] Under the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. §1988, Plaintiffs are entitled to their attorneys' fees and costs as the prevailing party in the district court. As a nonprofit civil rights organization, the Lawyers' Committee does not charge our clients for its time and expenses and requires its firm co-counsel to do the same. Instead, the Lawyers' Committee seeks to recoup its time and expenses through attorneys' fees awards and requests that its pro bono counsel donate its attorneys' fees to the Lawyers' Committee. This enables the Lawyers' Committee to fund future civil rights work. The Maryland HBCU case has been the most resource intensive case this century for the Lawyers' Committee and the attorneys' fees provision of HB 1260 reflects the amount of the fees and expenses accrued in this case so far. The State has driven up the costs of litigation by sparing no expense, including utilizing two outside law firms in addition to employing numerous attorneys from the Attorney General's Office.

creates an incentive to focus on short term enrollment rather than long-term sustainability of programs that are the centerpiece of Judge Blake's order. The following table compares the levels of funding in HB 1260 and SB 856.

Comparison between HB 1260 and SB 856

School	HB 1260*	SB 856**
Bowie	16,790,700	$12,200,000
Coppin	7,212,500	$10,000,000
Morgan	24,003,200	$23,100,000
UMES	9,693,600	$12,400,000

*Amount fluctuates each year based on each HBCUs percentage of overall HBCU enrollment
** Amount is constant

In addition, we suggest that HB 1260 be amended in regard to its provisions on online programming. Under HB 1260 the proposed legislation the University of Maryland Global Campus is mandated to work with HBIs with the goal of developing and offering online academic programs. Plaintiffs propose that HB 1260 be amended to stipulate that the UMGC mandate is not intended to restrict or restrain, in any way, the ability of HBIs to offer online programs using campus-based delivery platforms.

Our other suggested amendment relates to the use of consultants. HB 1260 encourages the HBCUs to retain a single consultant to advise the HBCUs as a collective. Because the expertise needed will vary from campus to campus and because of the necessity for expediting the activities outlined in this legislation, Plaintiffs propose HB 1260 be amended to indicate that each campus is encouraged to retain consultants as necessary to assist in the planning, development and implementation of the programs and other initiatives contained in said legislation.

Finally, we recommend that HB 1260 specifically give the Attorney General final authority to settle the case.

CONCLUSION

We applaud the leadership shown by the General Assembly, the Speaker, the Black Legislative Caucus, and this Committee in introducing HB 1260. Congressman Benny Thompson played a central role in settling the Mississippi HBCU litigation, and if HB 1260 is enacted, you can take similar credit for the Maryland HBCU case.

The enactment of HB 1260 is in the public interest. Investing in Maryland's HBCUs to make them comparable and competitive universities benefits the present and future students of the schools, the alums, and the community as a whole.

We are happy to answer any questions you have and to provide information you require.