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Judicial Proceedings Committee

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Senator Charles E. Sydnor III
Testimony Regarding SB0001
Historical Black Colleges and Universities - Funding
Before the Senate Budget and Taxation Committee
On January 20, 2021

Good afternoon Mr. Chairman, members of the Committee.

The purpose of Senate Bill 0001 is to right a long, historical wrong, to get on the right side of history, and to create the kinds of colleges and universities that all Marylanders can be proud of. It is an attempt to bring into existence the vision of lots of blue ribbon commissions that various Maryland Governors and Legislators have been calling for since the 1930's.

Starting in the 1930's, the era of de jure segregation, when "separate but equal" was the law of the land, Maryland prepared a series of official reports documenting the conditions of its Historically Black Institutions and comparing them to its Traditionally White Institutions. These reports chronicled a vast disparity between the two sets of institutions that Maryland repeatedly promised to remedy but failed to do so. Many of the early reports focused in the disparity in academic programs.

Federal Judge Catherine Blake cited to this history as well as more recent history when she found the State liable for a constitutional violation that she described as worse than Mississippi of decades ago. There is more than a 10-1 disparity in unique, high demand programs due to what the court called systematic unnecessary duplication of HBCU programs. Worse than Mississippi is bad. Fixing this 10: 1 disparity, according to Judge Blake, will require the State to fund a number of new academic programs at the HBCUs, and to supplement this funding with funding for scholarships, financial aid, marketing, and perhaps summer academies.

This unnecessary duplication, according to the court, was not consistent with best practices in higher education. The key word is unnecessary duplication. It hurt the HBCUs by hurting their

enrollment. It is a waste of State resources to have the exact same programs at the HBCUs as at the other schools. That is why it is called unnecessary duplication. This would be like having two federal agencies for every department -- one for the black community and one for other communities.

That was the whole illogic of separate but equal. The State was willing to have two sets of schools with duplicative programs to avoid having black students attend Traditionally White Schools. That was a waste of tax payer money. Now, we are being just as inefficient to keep the Historically Black Schools from having programs that can make them competitive, and make them able to attract more students, business partnerships, and research funding.

I want to talk about some of the history that the judge referred to. Let's begin in the 1930's, and I will end with a statement from the Court of Appeals in 2019, where the judges encouraged the legislature to get involved.

- **1937 Maryland Report of the Commission on Higher Education of Negroes discussed -- "Enormous differential in favor of the white race"**
    - "In the field of higher education, while the State has fostered white colleges for one hundred and fifty years it made its first grant to a Negro college in 1914 or twenty-two years ago. 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."
- **1947 Maryland's Marbury Commission Report**
    - "The state has consistently pursued a policy of providing higher education facilities for Negroes which are inferior to those provided for whites."
    - Marbury Commission Recommends "that the state budget provide such annual appropriations for the higher education of Negroes that the activities being conducted at those institutions may be maintained on a basis equal in quality to those maintained in comparable state institutions for white students."
    - But Maryland ignores the report.
- **1950 Maryland Weglin Commission Report**
    - Describes "the continuous uphill struggle on the part of the Negro colleges to secure facilities on par with white institutions."

- "None of these schools is equal in quality to the corresponding institution maintained for the white population."

- **1954 Brown v Board of Education**
  - United States Supreme Court declares "separate but equal" illegal under the constitution.
  - Maryland largely ignores the decision.
- **1969 US Department of Education Office of Civil Rights Approaches Maryland for Failure to Follow Brown Decision**
  - The Department concludes that Maryland continues to operate segregated system of higher education.
  - Maryland fights with Office of Civil Rights for several years until OCR threatens to cut off federal funding over status of and policies with respect to HBCUs.
- **1974 Maryland Cox Commission**
  - The Commission describes "inequities and disadvantages" faced by HBCUs.
  - The Commission calls upon state to enhance HBCUs to the level of Traditionally White Institutions.
- **1981 Report on "Enhancement of Maryland's Predominately Black Collegiate Institutions"**
  - The Report describes "deplorable condition of science laboratories, pronounced need for equipment maintenance and replacement, and generally poor condition of the residential space."
  - The Report also notes that "the libraries of the four historically black institutions are in need of new, expanded financial support and consistent funding."
  - As for all HBCUs, the report notes that "the inadequacies in life and physical science laboratories stand out as the greatest current need. These facilities, designed and constructed primarily for teacher education, are simply not adequate or appropriate for proper instruction and research in modern techniques."
- **1992 Maryland Draft Report Achieving Eminence: University of Maryland System Plan for Enhancement of the Historically Black Institutions"**
  - In developing enhancement plans, it became clear that the achievement of eminence for the historically Black institutions must address . . . "catch-up," which includes

funding of enrollment increases that over the years have had limited or no General Fund support, and areas of under-funding which include, for example, scholarships, student services, information technologies, libraries, and other institutional infrastructures.

- **2000 Maryland Enters Partnership Agreement with Office of Civil Rights To Make HBCUs Comparable and Competitive With TWIs**
    - Maryland commits to "[a]voiding unnecessary program duplication and expansion of mission and program uniqueness and institutional identity at the HBCUs", and bringing HBCUs up to a level to be "comparable and competitive" with Traditionally White Institutions in all aspects of their operation. The Agreement is listed on the web site of the Maryland Higher Education Commission.
- **2005 HBCU Presidents Write Letter to Maryland Black Caucus**
    - Asserting that Maryland has not complied with Agreement with Office of Civil Rights.
    - Asking for the appointment of independent panel of experts to study treatment of HBCUs, including funding, limited missions, and unnecessary program duplication.
- **2006 Maryland Chancellor Brit Kirwan testified before Maryland Legislature**
    - Admits that Maryland has "not done right over time by Historically Black Institutions and they deserve special scrutiny and attention in terms of adequacy of funding."
- **2006 Governor Ehrlich Vetoes Legislation Calling For Judicial Review Of Unnecessary Program Duplication-- A Bill Aimed At Helping HBCUs**
    - SB 998, sponsored by Senator Conway, among others, would have made certain program duplication decisions "subject to judicial review in the Circuit Court…." Governor Ehrlich vetoed the legislation on policy grounds.
- **2006 Attorney General's Office Warns the State that it is "vulnerable legally" because of its treatment of HBCUs.**
    - 2006 HBCU students, alumni, and the Coalition for Equity and Excellence in Higher Education filed suit.
- **2008 Maryland Bohanan Commission Studies Higher Education**
    - Independent experts conclude that Maryland policies "marginalized" the HBCUs.
    - Calls upon Maryland to "restructure the process that has caused the inequities and lack of competitiveness "between the HBCUs and TWIs."
- **2009 Maryland State Plan for Higher Education**

- Maryland officially adopted the conclusions of the Bohanan Commission experts and stated that the State was "committed to" closing the gap between the HBCUs and TWIs, including academic programs, teacher salaries, facilities, IT infrastructure.

- **2009 Maryland State Senators Jones and Conway Introduce Blount-Rawlings-Britt HBI Comparability Program**
  - The Blount-Rawlings-Britt HBI Comparability Program, SB 544, was proposed to "provide supplemental funding to the state's HBIs for the purpose of ensuring that the HBIs are comparable and competitive with other state 4-year public institutions of higher education in all facets of their operations and programs as measured by generally recognized indicators of disparity." This bill was reintroduced in subsequent sessions. The General Assembly took no action on the bill.
- **2012 Maryland Officials Make Important Admissions at Trial**
  - Geoffrey Newman, Maryland Higher Education Commission Director of Finance Policy said "[S]ubstantial additional resources must be invested in the HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment."
  - Dr. James Lyons, Former Maryland Secretary of Higher Education said HBCU facilities are "vestiges" of the de jure era.
  - (Dr. George Reid, Former Maryland Higher Education Commission Assistant Secretary for Planning and Academic Affairs) said: "[S]ubstantial additional resources are needed to ensure the state's HBIs are comparable to the state's TWIs on the point of recruitment, retention and graduation."
- **2013 Federal Judge Catherine C. Blake rules Against Maryland Coalition on Liability**
  - Judge Blake said program disparity was worse than Mississippi of the decades ago.
  - The court saw a systematic attempt to undermine the HBCUs enrollment.
    - "During the 1960's and 1970's, in the wake of Brown, Maryland's HBIs began offering unique, high-demand programs and began attracting significant numbers of white graduates. Rather than building on that progress, however, Maryland made very large investments in TWIs, particularly newly created Towson and UMBC that hurt preliminary gains in desegregation. These investments included further duplication of programs at already existing TWIs and creating new public institutions in geographic proximity to existing HBIs, including UB, Towson, and

UMBC. (In the 1980's, white enrollment began to decline very markedly," and that trend continues today. The early gains that had been made in integration at Maryland's HBIs halted almost as soon as they began, and the State has continued to duplicate HBI programs at TWIs, failing to address the dual system it created in the de jure era.")

- Maryland violated the 2000 Agreement with the Office of Civil Rights To Provide and Pay for Unique, High Demand Programs at the HBCUs.
- Judge Blake blamed State for disparity in growth of graduate programs between HBIs and TWIs.
- The court ruled that the remedy must include "expansions of mission and program uniqueness and institutional identify at HBIs" "each HBI should develop programmatic niches of areas of excellence in at least two high demand clusters as a starting point." Sent parties to mediation to develop a remedial plan.

- **2016 Judge Blake Rejected the State's Remedial Plan as "inadequate".**
- **2017 Judge Blake Criticized Maryland as "not serious" about solving the problem**.
    - Judge Blake issued a Remedial Order what would Provide Federal Oversight of Maryland Higher Education for 10 years. Ordered Maryland to pay for academic programs, scholarships, financial aid, and marketing at the HBCUs. She rejected State's argument that the Remedy was too expensive, and ordered each of the 4 HBCUs to provide a plan of academic programs, scholarships, marketing, and financial aid. The State put the cost at between $1-2 billion dollars.
- **2019 Maryland Appeals Judge Blake's Ruling**
    - *4th Circuit Urges Legislators to Appropriate Funds to Settle the Case*

This is what the 4th Circuit said in January of 2019: "The Court is of the firm conviction that this case can and should be settled. Otherwise, the parties will likely condemn themselves to endless years of acrimonious, divisive and expensive litigation that will only work to the detriment of higher education in Maryland."

Judge Wilkinson, a conservative judge appointed by President Reagan, said during the hearing:

"Isn't the answer here to make sure that the HBIs are adequately funded?"

"Why doesn't the answer lie in appropriations? Why didn't this case settle in appropriation?"

- **We Are in the Wrong: It is Time to Make It Right**

The issues in the Coalition lawsuit have been a priority for the Legislative Black Caucus for a long time, and it has been studied by a lot of commissions. A conservative federal judge has now found the State guilty and a conservative appeals court has said that the legislature should get involved and pay to bring the case to an end. If Mississippi could do it for $791 million for 3 schools, surely we can pay $577 million for 4 schools. That is better than the $1-2 billion remedy that the court ordered. In fact, the State of Maryland has already spent millions of dollars on a large private law firms, in addition to the thousands of hours from attorneys on the Attorney General's office, but we lost at trial in 2013.

The judge gave the State a chance to come up with a remedy. But it did not. Here is what the court said: "unfortunately the State did not engage in a serious effort to propose a remedy." That is what the Judge said in 2017, that Maryland was not serious.

Not A Partisan Issue

The courts don't care if a Republican Governor offers more than his predecessor, a Democratic governor, they care about whether the offer is enough to fix the problems. I find it kind of interesting that former Lt. Governor Michael Steele said after Judge Blake found the State liable in 2013. He wrote in the Afro Newspaper: "I was heartened by District Court Judge Catherine C. Blake's October 7th ruling". He wrote: "I was stunned to have certain academic and legislative "leaders" ask me directly why our administration would want to invest dollars in "those schools". They argued that we should put such program dollars in the predominantly white schools and allow the students from the HBCUs to visit those campuses to take a course or to use laboratories. Understand that this occurred not in 1955 but in 2005."

So we should not look at this as a partisan issue, of how a Republican Governor compares to a Democrat Governor. This is enough blame to go around. If Governor Ehrlich had not vetoed the bill in 2006, we would not be here. If the legislature had passed Blount-Rawlings-Britt HBI Comparability Program, we would not be here. If we had lived up to our Agreement with the office of Civil Rights in 2000, or our commitment in the 2009 State Plan for Higher Education, we would not have a federal judgment hanging over our head.

5 Key Things This Bill Will Accomplish

- Avoid having to pay $1-2 Billion dollars
- Avoid federal oversight for next 10 years
- Settle case for less than the $791 million that Mississippi paid for 3 schools
- Remove the stain of the judgment for a Constitutional Violation
- Help to create better schools that are open to all Maryland Citizens. Judge Blake said that her order was intended to "strengthen and enhance Maryland's HBIs for the benefit of all Maryland students, present and future." That is what we have to keep in mind as well.

- **Why We Can't Wait: And Why Other Legislators Have Stepped in to Solve Similar Problems**

I know that some have suggested that the legislature should not be involved but should just let the litigation play itself out, and that the Legislature to get involved. It reminds me of the sentiment when Dr. King wrote to some fellow clergy in his Letter from the Birmingham Jail: He wrote:

> "While confined here in the Birmingham city jail, I came across your recent statement calling my present activities "unwise and untimely". For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

This case has been going on over 10 years, but as Judge Blake noted the issues affecting the black schools go back 100 years, and cover lots of commissions appointed by Governors and legislators. Colleagues, we can no longer wait. Our acting in this fashion is not without precedent. Legislatures in other states have gotten involved to settle litigation that affected constitutional

rights of their citizens as this case does. This includes New Mexico in 2019,[1] Texas in 2013 and 1982[2], the state of Washington in 2012[3] and Missouri in 1998[4]

We have also acted to provide appropriations to settle a case involving school funding. The K-12 school adequacy litigation, *Bradford v. Maryland*, that case was first resolved in 1996 as a result of the Assembly's commitment to put more money into Baltimore City schools. In 2000, when the plaintiffs sought to enforce the Consent Order, we responded by adopting the recommendations of the Thornton Commission in 2001 and promised to put $1.1 billion into education. Even today, after the case was reopened again in 2019, the Assembly is considering the recommendations of the Kirwan Commission, which include putting $4 billion in state funding.

Summary

This bill would be good for the HBCUs and good for the State by removing a cloud and the possibility of a 1-2 billion judgement and 10 years of federal oversight. Just imagine how that would look, and how much Trump would tweet about it at the same time our Attorney General is suing him on a variety of issues.

In conclusion, this doesn't have to be business as usual in the Free State. We do not need legal intervention to do what we all know is right, we all know is decent, and what we all know is necessary to keep Maryland as a national standard-bearer for civic sustainability. The previous

[1] In 2019, New Mexico Governor Michelle Lujan signed several bills aimed at resolving the deficiencies found by a state district court in the educational opportunity case, *Martinez v. New Mexico*, No. D-1-1-CV-2014-00793 (NM Dist. Santa Fe Cty.).

[2] In 2013, following a state district court's ruling holding the Texas school finance system unconstitutional but prior to an appeal in *Texas Taxpayer & Student Fairness Coalition v. Williams*, the legislature passed school finance and accountability legislation. The actions led the court to reopening the case. No. D-1-GN-11-003130, 2013 WL 3199634, at *1 (Tex. Dist. Travis Cty. June 19, 2013). In 1982, in an appeal by Texas of a court order directing the state to revamp its education system for English Learners to comply with the Equal Educational Opportunities Act, the Fifth Circuit held the order moot after noting that—during the litigation—the Texas Legislature enacted the 1981 Bilingual and Special Language Programs Act. *United States v. State of Tex.*, 680 F.2d 356, 372 (5th Cir. 1982).

[3] In 2012, following a trial court victory for the plaintiffs and while the appeal was pending before the Washington Supreme Court in *McCleary v. State*, the legislature passed an appropriations bill attempting to resolve the litigation. 173 Wash. 2d 477, 540 (Wash. 2012).

[4] In 1998, the Eighth Circuit dismissed an appeal in light of a Missouri constitutional amendment passing that authorized additional tax levy and other legislation authorizing additional funding pending settlement of the desegregation case, *Missouri v. Jenkins*, 158 F.3d 984 (8th Cir. 1998).

commentary from judges, in this case, have classified Maryland, at least in the context of support for a more diverse system of higher education, as a worse offender than the State of Mississippi in the height of its Jim Crow years. This simply cannot stand, and it is too simple to resolve.

Language in this bill reflects appropriate advocacy on behalf of the HBIs but also acknowledges the continuing value of the state's higher education commission. Its details clearly point out the roles and responsibilities of the commission and the four HBCUs in working in one accord to right the wrongs of the past while deliberately delivering a new future of program autonomy and industrial necessity.

There is a bright future for a state of Maryland that embraces stronger institutions of higher education. There is no lost cause in more universities inspiring and equipping minds to solve the most intractable problems of our day while keeping their talent and resources here in our state upon graduation. We do not have to lose talented minds and skills to neighboring states who want an experience like the ones offered here, but made to be more attractive in states like North Carolina and Delaware, which have worked to make their historically black schools more comprehensive and attractive in recent years.

I implore my colleagues to consider the advancement of this legislation and all of the promise it can deliver for generations to come. Please vote favorably for Senate Bill 0001.