

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Judiciary Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 413
Judges – Implicit Bias – Testing, Training, and Evaluation
DATE: January 21, 2021
(1/27)
POSITION: Oppose

The Maryland Judiciary opposes House Bill 413. The proposed legislation requires that the State Court Administrator ensure that each judge in the state receive tests, training and evaluation for implicit bias and provide data to the public or by request.

Current laws recognize that the Chief Judge of the Court of Appeals has authority over the behavior and training of Judges in Maryland. Courts and Judicial Proceedings Article (“CJP”) § 1-201 empowers the Court of Appeals to make rules and regulations for courts of the state. The Court of Appeals has enacted Title 18 of the Maryland Rules which addresses Judicial Conduct, Judicial Disabilities, and Discipline. Also, CJP § 13-401 recognizes the Commission on Judicial Disabilities, which is established by Article IV, § 4A of the Maryland Constitution, and grants the Commission powers, such as the power to administer oaths or issue subpoenas, that are helpful in carrying out its duty to investigate judicial misconduct.

By Administrative Order, on June 6, 2016, the Chief Judge of the Court of Appeals reorganized Judicial Education and renamed the same as the Judicial College of Maryland, “responsible for the continuing professional education of judges” and “[t]he Education Committee of the Judicial Council shall establish subcommittees and work groups to develop, with the support of the Judicial College, the courses, educational programs, and academic opportunities offered to judges, magistrates, commissioners, and other Judiciary employees....”

No statutes attempt to infringe on the powers of the Court of Appeals, including the Chief Judge, to oversee Judicial conduct and to decide on appropriate training and education for

Judges.¹ Thus, this bill goes much further than any other statute in imposing on the Court of Appeals' responsibility for Judicial oversight and training.

Most importantly, this bill violates the Maryland State Constitution's separation of powers doctrine by infringing on duties constitutionally assigned to the Judicial Branch. This legislation invites an analysis of the Separation of Powers that relies on the language of *Attorney Gen. of Maryland v. Waldron*, where the General Assembly acted outside of its "constitutional bailiwick" by imposing restrictions on retired judges receiving a pension to practice law. In overturning the statute at issue in *Waldron*, the Court of Appeals held that "Maryland's judiciary in the past generally has been able to harmonize its obligations with enactment by the General Assembly of a restricted class of statutes relating to the legal profession, passed by the Legislature pursuant to its interest in promoting the health, safety and welfare of the people of this State. This harmony heretofore has been possible because the legislation has been calculated to, and did, augment the ability of the courts to carry out their constitutional responsibilities; at the most, there was but a minimal intrusion." This bill, though, goes beyond "augmenti[ng]" the Judiciary's ability to carry out its responsibilities.

The power to ensure integrity and impartiality among judges is a core responsibility of the Judicial branch. Article IV, § 4A of the Maryland Constitution establishes the Commission on Judicial Disabilities, and § 4B assigns the Commission power to "[i]nvestigate complaints against any judge" and to "recommend to the Court of Appeals the removal, censure, or other appropriate disciplining of a judge[.]" In addition, Section 4B assigns to the Court of Appeals the power to discipline a judge upon a finding of "misconduct while in office, or of persistent failure to perform the duties of the office, or of conduct prejudicial to the proper administration of justice[.]"

HB 413 is an overreaching means to, presumably, promote the health, safety, and welfare of the people of the state by ensuring a bench free of implicit bias. The bill, however, encroaches severely upon the Court of Appeals' constitutional duty to oversee the

¹ State Personnel and Pensions, § 2-203.1, passed into law in 2018 (HB1423/18), applies to the Executive, Judicial, and Legislative branches of Maryland State Government, and requires that each "State employee" complete at least 2 hours of sexual harassment prevention training. Section 2-203.1 seeks to reduce sexual harassment in state employee workplaces. See Fiscal Note to HB1423/18. Thus, § 2-203.1 applies to all Maryland state employees in their capacities as members of state workplaces. Unlike that statute, however, HB 413 does not apply broadly to all state employees. Instead, it applies exclusively to judges. Moreover, HB 413 does not apply to Judges in their capacity as members of state workplaces. Instead, it is apparent that that HB 413 applies to judges in their judicial capacity by attempting to identify implicit bias among judges, address such implicit bias presumably to limit its impact on judges' rulings, and to report to the public anonymized data regarding such bias among judges. So, despite having a laudable intent, HB 413 attempts to impact the Judiciary's fundamental authority of ruling on cases, while imposing on the Court of Appeals' duty to ensure impartiality and professionalism by judges.

integrity and impartiality of State judges by mandating a means of assessing bias amongst judges and by requiring public disclosure of data about the same. Further, the bill ignores the existing mechanisms in the Judicial Branch to offer trainings and the expertise of the Judicial Council (specifically the Education Committee) and the Judicial College to determine the most suitable trainings for the bench. In doing so, the bill infringes on the constitutional role of the Chief Judge of the Court of Appeals as “administrative head of the Judicial system of the State[.]”

Finally, the legislation requires that the State Court Administrator ensure that anonymized data on all implicit bias tests and evaluations required by the bill be made available to the public on a website or by request. Article IV, § 18(a) of the Maryland Constitution authorizes the Court of Appeals to adopt Rules concerning the practice and procedure in and the administration of the courts of this State, and this requirement runs afoul of the Maryland Rules governing access to Judicial Records. Maryland Rule 16-913(e) provides that, “[a] custodian shall deny inspection of judicial records prepared by, for, or on behalf of a unit of the Maryland Judiciary for use in the education and training of Maryland judges, magistrates, clerks, and other judicial personnel.” This requirement falls squarely within this exception.

cc. Hon. Melissa Wells
Judicial Council
Legislative Committee
Kelley O’Connor