HB 1062

Department of Legislative Services

Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1062 (Delegate Sydnor, *et al.*)
Appropriations

Historically Black Colleges and Universities – Appointment of a Special Advisor – Development of a Remedial Plan (HBCU Equity Act of 2018)

This emergency bill requires a special advisor to be appointed to develop a remedial plan and submit findings and recommendations, by August 1, 2018, that will resolve the issues raised under *The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.* The special advisor must, among other things, propose a set of new unique programs for historically black colleges and universities (HBCU). The remedial plan must include specified funding and a system of reporting and monitoring the implementation of the plan and may not recommend program transfers or closings of institutions of higher education without agreement from the affected institutions. By December 1, 2018, the Department of Legislative Services must draft legislation to implement any statutory changes that need to be made as the result of the special advisor's findings and recommendations.

Fiscal Summary

State Effect: The bill does not require implementation of the remedial plan developed under the bill; thus, the bill has no direct fiscal impact. However, as discussed further below, the *implementation* of a remedial plan will likely significantly increase general fund expenditures for HBCUs. Under the plan developed due to the bill, funds could be distributed as early as FY 2019 although are likely not distributed until FY 2020 or beyond.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary:

Selection of the Special Advisor

The State Bar Association must submit to the President of the Senate and the Speaker of the House three names of individuals who specialize in education law and who are willing to serve as a special advisor by June 1, 2018. Not more than two weeks after receiving the three names, the President and the Speaker must jointly select one of the individuals to serve as special advisor.

Remedial Plan

In developing the remedial plan, the special advisor:

- must consult with both the plaintiffs and the defendants in *The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.*;
- may consult with witnesses and consultants who were involved with the case;
- must incorporate elements of both the plaintiff's and defendants' remedial plans submitted to the U.S. District Court as part of the lawsuit; and
- must propose a set of new unique programs, or high-demand programs, or both, at HBCUs (Bowie State University, Coppin State University, Morgan State University (MSU), and the University of Maryland Eastern Shore (UMES)) in the State that take into account each institution's strength, physical building capacity, and programmatic niches.

The remedial plan developed under the bill must include (1) funding for a period to be used for student recruitment, financial aid, marketing, and related initiatives and (2) a system of reporting and monitoring of the implementation of the remedial plan developed under the bill.

Current Law/Background:

The Coalition for Equity and Excellence in Maryland Higher Education, a group of former, current, and prospective students at Maryland's HBCUs, is suing the State and the Maryland Higher Education Commission (MHEC) alleging violations of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The lawsuit was initially filed in 2006 in Baltimore City but was moved a few weeks later to the U.S. District Court. After attempts at mediation failed and after a long process of

discovery, a six-week bench trial was held in January and February 2012 with closing oral arguments in October 2012.

The parties have never disputed that Maryland operated a *de jure* (as a matter of law) system of segregated public higher education before 1969, when the U.S. Department of Education's Office for Civil Rights found the State in violation of Title VI of the Civil Rights Act of 1964. In the coalition's lawsuit, three policies of the Maryland system of higher education allegedly traceable to the prior de jure system were at issue: (1) limited institutional missions; (2) operational funding deficiencies; and (3) unnecessary program duplication.

On October 7, 2013, the U.S. District Court issued a memorandum (which at the time was not a final decision of the court) of its findings of fact and conclusions of law. Although the court noted that the institutional missions of HBCUs are linked to the de jure era, the court held that the coalition was unable to demonstrate that the State is responsible for limiting, perpetuating, or imposing missions on HBCUs.

The court rejected the coalition's allegation that operational funding deficiencies at HBCUs were entrenched in or a continuation of funding practices that were segregative and traceable from the *de jure* era. Maryland's current funding framework is structurally different than prior funding policies and practices. In fact, the court found that under Maryland's current funding system, HBCUs are not underfunded by the State, relative to traditionally white institutions (TWIs), but rather Maryland appropriates slightly more per full-time equivalent student at HBCUs than at TWIs. Further, the court found that Maryland's HBCUs are funded at or above their peer-based funding targets. While the court noted that HBCUs struggle financially because of factors such as lower tuition revenue, insufficient fundraising capacity, and difficulty in attaining external grants, the court found that these factors are outside of State control. The court held that additional funding, in excess of what the State has already provided HBCUs in enhancement funding, is not required. (The court previously ruled in summary judgment that another of the coalition's claims related to capital funding deficiencies was not proved and, therefore, that claim did not proceed to trial.)

However, the court did find that the State failed to eliminate unnecessary program duplication for Maryland's HBCUs and that this policy is traceable to the *de jure* era.

Unnecessary Program Duplication

The court concluded that the coalition proved that unnecessary program duplication continues and is a policy traceable to prior *de jure* segregation. The court, applying the law established by the U.S. Supreme Court in *United States v. Fordice*, defined unnecessary duplication as the offering by two or more institutions of the same nonessential

or noncore programs, nonbasic liberal arts and sciences course work at the bachelor's level, and all duplication at the master's level and above. The court cited MHEC's decision to approve a joint University of Baltimore (UB)/Towson University (TU) Masters of Business Administration program (MBA), despite the objections of MSU in 2005, as an example of how the State failed to prevent additional unnecessary duplication. (TU and UB did not renew the Memorandum of Understanding when it expired in October 2015, resulting in the program reverting back to UB.)

The court found that the State's "sound educational justification" for program duplication consisted of justifications for the approval of the MBA program at UB/TU rather than a thorough and thoughtful assessment and analysis of whether the same goals could be accomplished with less segregative results, such as offering MSU additional funding for its MBA program or establishing a program at another HBCU instead of a TWI. The court also found that, in addition to failing to disapprove new duplicative high-demand programs at TWIs within close proximity to HBCUs, MHEC also failed to analyze and eliminate existing high-demand programs that are duplicated at TWIs and HBCUs.

The strong collaborative partnership between UMES and Salisbury University (SU) that currently exists demonstrated to the court that unnecessary program duplication can be minimized. The court found that only 9% of HBCU programs are unnecessarily duplicated on the Eastern Shore, while 38% are unnecessarily duplicated in the Baltimore area. In 2009, UMES had a 13.3% white student population, which is significantly more desegregated than the 1% to 4% white student population at HBCUs in the Baltimore area, which the court attributed to the lack of unnecessary duplication at UMES and SU.

Determining a Remedy

The court deferred entry of judgment pending mediation or further proceedings to establish a remedy. The case was referred back for mediation with a suggested starting point that each HBCU "should develop programmatic niches of areas or areas of excellence in at least two high-demand clusters within the next three to four years." The niche areas identified by the court include Green Sustainability Studies, Computer Sciences, Aging Studies, and Health Care Facilities Management. However, mediation was unsuccessful.

In 2016, both the plaintiffs and the defendants proposed remedies at the request of the court. The plaintiffs proposed to increase other-race enrollment at HBCU by the creation of "programmatic niches" at each HBCU and various academic "enhancements" at each HBCU. These "programmatic niches" are clusters of related undergraduate and graduate programs, at least some of which are "unique" and in high demand among students. To create these unique, high demand programs, the plaintiffs generally called for either the creation of new programs at HBCUs or the transfer of programs from TWIs to HBCUs. In some instances, the plaintiffs proposed new collaborations between HBCUs and TWIs.

The plaintiffs estimated that the operating costs for the 10 proposed programmatic niches at the four HBCUs would be roughly between $230 and $650 million over five years, not accounting for capital costs and other "enhancements" in the proposal.

To address academic "enhancements" the plaintiffs suggested that any remedy should include $50 million over a 10-year period per HBCU in "enhancement funds for marketing and scholarships" and $50 million over 10 years per HBCU "to strengthen the support for the academic niches through upgrades in areas such as equipment, materials, and support for faculty and students."

The State proposed $50 million over five years for enrollment management, financial aid, campus inclusion initiatives, and summer academies to supplement State funding for HBCUs.

Special Master

A six-week hearing on remedies took place in 2017. Following oral argument, on November 8, 2017, the court found that neither party's remedial plan was "practicable, educationally sound, and sufficient to address the segregative harms of program duplication at the [HBCUs]." Therefore, the court will appoint a special master to develop a remedial plan. In crafting the plan, the special master must consult with relevant actors. The plan must incorporate elements of both parties' remedial proposals and propose a set of new unique programs, or high-demand programs, or both at each HBCU. These should be determined by taking into account areas of strength, physical building capacity, and programmatic niches. The plan may not include program transfers or closings of institutions absent agreement from the impacted institutions of higher education. Finally, the plan must provide funding to HBCUs to be used to support student recruitment, financial aid, marketing, and related initiatives. The court will receive periodic reporting regarding implementation of the special master's plan.

Both the coalition and the State have appealed the District Court's decision (including the remedial order) to the U.S. Court of Appeals for the Fourth Circuit. On February 6, 2018, Judge Blake stayed the court proceedings pending the outcome of the Fourth Circuit appeal. Opening briefs on the appeal are due beginning on April 25, 2018.

On February 7, 2018, Governor Hogan proposed a $100 million settlement, which would supplement State appropriations to the HBCUs over a 10-year period. It is not known how the funds would be allocated among the institutions or if it would be used consistent with the judge's order. According to the Governor's office, these issues would have to be negotiated between the parties, resolved with the court, and included in the final settlement agreement.

State Fiscal Effect: The bill does not require either party to implement the remedial plan; thus, the bill has no direct fiscal impact. The bill does not provide for the special advisor to be compensated; thus, it is assumed that the special advisor develops the remedial plan free of charge.

Depending on the outcome of the Fourth Circuit appeal, it is anticipated that *implementing* a remedial plan to resolve the lawsuit that began in 2006 developed by either a special master appointed by the court or a special advisor appointed under the bill, which both have very similar elements, will increase general fund expenditures for HBCUs by millions of dollars. HBCU revenues and expenditures increase by an equal amount. In addition, future tuition revenues or other revenues and expenditures at those institutions and other public institutions of higher education may be affected. The bill requires the special advisor to submit findings and recommendations by August 1, 2018, and related legislation be drafted by December 1, 2018. Thus, funds could be distributed as early as fiscal 2019 (via a deficiency appropriation), although funds are likely not distributed until fiscal 2020 or beyond.

To the extent that the plan resolves the lawsuit, State expenditures related to the lawsuit end. However, any such decrease cannot be reliably estimated.

Additional Information

Prior Introductions: None.

Cross File: SB 827 (Senator Conway, *et al.*) - Education, Health, and Environmental Affairs and Budget and Taxation.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Higher Education Commission; University System of Maryland; Morgan State University; Department of Legislative Services

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