

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 1

(Senator Sydnor, *et al.*)Budget and Taxation and Education, Health,
and Environmental Affairs

Appropriations

Historically Black Colleges and Universities - Funding

This emergency bill, contingent on final settlement of *The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.* lawsuit by June 1, 2021, provides a total of \$577.0 million in general funds for Maryland's historically black colleges and universities (HBCUs) from fiscal 2023 through 2032 to be distributed and used as specified. Specified Cigarette Restitution Fund (CRF) revenues, if available, must be used instead of general funds. An HBCU Reserve Fund is created to hold unused funds at the end of each fiscal year. A new academic program evaluation unit is established in the Maryland Higher Education Commission (MHEC) with a specified mandated staffing level. In addition, the bill has several study and reporting provisions that are not contingent on final settlement of the lawsuit. **Most of the bill's provisions are contingent on the execution of a final settlement agreement in the HBCU lawsuit, as specified, by June 1, 2021.**

Fiscal Summary

State Effect: No effect in FY 2021, but general fund expenditures increase for a consultant in FY 2022 and, assuming a final settlement is reached, by \$60.8 million in FY 2023. Out-years reflect elimination of one-time costs, ongoing staffing costs, and a total of \$577.0 million for HBCUs appropriated by FY 2032. General fund expenditures may be partially offset by use of specified CRF revenues, but the impact, if any, cannot be reliably estimated as discussed below. HBCU revenues and expenditures increase correspondingly (not shown below). HBCU Reserve Fund (special fund) revenues and expenditures likely increase. **This bill establishes mandated appropriations for FY 2023 through 2032.**

(\$ in millions)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
SF Revenue	\$0	-	-	-	-
GF Expenditure	\$0.2	\$60.8	\$61.6	\$61.7	\$61.7
SF Expenditure	\$0	-	-	-	-
Net Effect	(\$0.2)	(\$60.8)	(\$61.6)	(\$61.7)	(\$61.7)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary:

Legislative Findings

The bill expresses the following legislative findings. The State of Maryland wishes to provide all of its citizens with equal access to higher education at excellent and affordable public colleges and universities. The General Assembly has carefully reviewed the Memorandum of Opinions and Orders of the U.S. District Court for the District of Maryland, issued October 7, 2013, and November 8, 2017, in the action, *The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.* (06-CV-02773-CCB). The District Court found that the State failed to eliminate a traceable *de jure* era policy of unnecessary program duplication that has exacerbated the racial identifiability of Maryland's HBCUs. Maryland's HBCUs, which are Bowie State University (BSU), Coppin State University (CSU), Morgan State University (MSU), and the University of Maryland Eastern Shore (UMES), should receive additional support to remedy the findings of the District Court. The additional support must be (1) in the form of \$577.0 million; (2) provided as calculated in the bill each fiscal year from 2023 through 2032; and (3) allocated among the institutions. The specified provisions of the bill ensure that Maryland's HBCUs receive this support.

Maryland Higher Education Commission – Program Evaluation Unit

MHEC must establish a program evaluation unit to evaluate new programs and substantial modifications. The unit must have at least 10 staff members. The staff members assigned to the unit must be in addition to the current workforce of MHEC.

The unit established under the bill must assist MHEC in reviewing and evaluating proposals for new academic programs and substantial modifications of existing academic programs in accordance with current law. Beginning in fiscal 2023, the Governor must include in the annual operating budget an amount sufficient to employ the 10 staff members required by the bill.

Funding for Historically Black Colleges and Universities

For fiscal 2023, the Governor must include in the annual State operating budget general funds of at least:

- \$16,790,700 for BSU;
- \$9,000,000 for CSU;
- \$24,003,200 for MSU; and
- \$9,693,600 for UMES.

For each of fiscal 2024 through 2032, the Governor must include in the annual State budget bill general fund appropriations to HBCUs based on the calculations described in the bill. Accordingly, for fiscal 2024 through 2031, \$57.7 million is allocated annually based on the percentage share of students enrolled during the immediately preceding academic year compared to the total number of students enrolled at all HBCUs. Each HBCU is allocated that product, or \$9.0 million, whichever amount is greater. For fiscal 2032, the Governor must appropriate the general funds remaining to be allocated from the \$577.0 million total based on the percentage share of students enrolled during the immediately preceding academic year.

At the end of each fiscal year, any unused funds provided under the bill must be distributed to the HBCU Reserve Fund established by the bill.

Funds provided are supplemental to, and may not supplant, funds appropriated to public institutions of higher education in the State budget. The funds may be used for the following purposes, as determined by the university receiving the funds: scholarships and financial aid support services; faculty recruitment and development; expanding and improving existing academic programs, including online programs; development and implementation of new academic programs, including online programs; academic support; and marketing. The funds provided under the bill may not be included in the calculations of State funding for the higher education funding formulas for Baltimore City Community College, local community colleges (Cade), and specified private nonprofit institutions (Sellinger).

By December 1 of each year from 2023 through 2033, each HBCU must report on (1) the uses of the funds and (2) any new academic program developed with respect to development costs, start-up costs, and ongoing costs to maintain the program.

Historically Black Colleges and Universities Reserve Fund

The bill establishes the HBCU Reserve Fund to hold HBCU settlement funds that are unused at the end of each fiscal year by BSU, CSU, MSU, and UMES. The funds may be used for the same purposes as specified for the initial allocation of the funds.

MHEC must administer the fund; the State Treasurer must hold the fund separately and invest the money of the fund in the same manner as other State money may be invested;

and the Comptroller must account for the fund. The HBCU Reserve Fund is a special, nonlapsing fund that consists of any settlement monies unused (by an HBCU) at the end of a fiscal year distributed to the fund, money appropriated in the State budget to the fund, interest earnings, and any other money from any other source accepted for the benefit of the fund. The fund may be used only for the uses specified.

Expenditures from the fund may be made only in accordance with the State budget. Money expended from the fund for the uses specified is supplemental to, and is not intended to take the place of, funding that otherwise would be appropriated for the uses specified or any other funds appropriated to public institutions of higher education in the State budget.

Provisions Contingent on Final Settlement Agreement

Section 1 of the bill, which includes all of the provisions discussed above, is contingent on the execution of a final settlement agreement by June 1, 2021, that (1) incorporates and does not exceed the financial and programmatic commitments contained in Section 1 of the bill; (2) incorporates the court order regarding the case as specified; and (3) provides for attorney's fees and expenses in an amount of at least \$14.0 million but no more than \$25.0 million to plaintiff's counsel in the case.

In fiscal 2023, the Governor must provide an allocation for the attorney's fees and expenses as specified in the final settlement agreement. That amount must come from the funds for HBCUs, with each institution's share of the fees and expenses based on each institution's share of the total funds provided.

The settlement agreement, including any attorney's fees and expenses provided in the settlement agreement, is not subject to approval by the Board of Public Works (BPW).

The Attorney General is authorized to execute the final settlement agreement on behalf of the State on the terms the Attorney General deems as final resolution of *The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.* (06-CV-02773-CCB) and appropriate to implement the purposes of Section 1 of the bill. In addition, the Attorney General must provide written notice of the executed settlement agreement to the Department of Legislative Services (DLS).

Section 1 of the bill, with no further action required by the General Assembly, is null and void if, by June 11, 2021 (1) DLS has not received notice of the settlement agreement and (2) an order has not been issued from the U.S. District Court for the District of Maryland or the U.S. Court of Appeals for the Fourth Circuit that reverses or vacates the District Court's holding that the State failed to eliminate a traceable *de jure* era policy of unnecessary program duplication or holds that any policy of unnecessary program

duplication traceable to *de jure* segregation has been cured by the terms of the settlement agreement.

Online Academic Programs

The University System of Maryland (USM) William E. Kirwan Center for Academic Innovation, in collaboration with UMUC Ventures, must work with the State's HBCUs with the goal of developing and offering online academic programs. The procurements and contracts for developing and offering online academic programs are not subject to the approval of BPW. The Board of Regents of USM may use the fund balance to support the development and offering of online academic programs. By December 1, 2021, each institution must submit a report on its efforts and any findings that summarizes the steps taken to comply with the requirement.

Maryland Higher Education Commission – Consultant Study of Policies and Practices

DLS must contract with a consultant to study the capacity and capability of MHEC to carry out its current policies and practices and any new policies or practices established in accordance with the bill for the purpose of (1) evaluating, streamlining, improving, and making recommendations on such policies and practices with respect to academic program review; (2) enhancing the economic competitiveness of the State by ensuring the responsiveness of institutions of higher education to market demand; and (3) effectively supporting the State's workforce development requirements. MHEC must provide any information required by DLS or the consultant conducting the study in a timely manner. DLS must submit an interim report by December 1, 2021, and a final report by September 1, 2022.

Historically Black Colleges and Universities – Program Development

The State's HBCUs are encouraged to hire a consultant who would assist the institutions, as a collective, with programmatic development. By December 1, 2021, each institution must submit a report on its efforts and any steps taken to comply.

Linkage to the Blueprint for Maryland's Future

The State's HBCUs are encouraged to use funds provided under the bill to support and implement the Blueprint for Maryland's Future.

Cigarette Restitution Fund

The bill requires CRF to include a separate account consisting of payments received by the State as a result of litigation related to the State's enforcement of State law regarding the

Master Settlement Agreement (MSA) that requires tobacco product manufacturers to participate in the MSA or annually deposit funds into escrow as specified. Distributions from the account may only be used to supplant the general fund appropriation to HBCUs.

Current Law:

Processes for Implementing New Academic Programs

There are two processes for implementing new academic programs at institutions of higher education: one for new programs that can be implemented with existing resources and another for new programs that will require additional resources. The processes are overseen by MHEC, and MHEC's determinations about program approval are not subject to judicial review or administrative appeal.

Institutions of higher education seeking to implement new programs with new resources must submit proposals for the new programs to MHEC, and MHEC must approve or disapprove the programs or, in the case of private nonprofit and for-profit institutions of higher education, recommend that the programs be implemented or not implemented. If MHEC fails to act within 60 days of the date of submission of a completed proposal, the proposal is automatically deemed approved.

When a public or private nonprofit institution of higher education determines that it can implement a new program with existing resources, the president of the institution must submit the proposal to the institution's governing board and to MHEC, and MHEC must distribute the proposal to other institutions. MHEC or another institution may file an objection to the proposal based on (1) inconsistency with the mission of the institution proposing the program; (2) a lack of need for the program; (3) unreasonable program duplication that could cause harm to another institution; or (4) violation of the State's equal educational opportunity obligations (known as *unnecessary* program duplication). Based on those factors, MHEC must determine if an institution's objection is justified. If MHEC determines that an objection is justified, it must negotiate with the institution's governing board and president to modify the proposal. If the objection cannot be resolved within 30 days of receipt of an objection, MHEC must make a final determination about the approval of the proposed program for a public institution of higher education or a final recommendation on implementation for a private nonprofit institution of higher education.

Cigarette Restitution Fund

Chapters 172 and 173 of 1999 established CRF, which is supported by payments made under the MSA. Through the MSA, settling tobacco manufacturers pay the litigating parties – 46 states, 5 territories, and the District of Columbia – substantial annual payments in perpetuity. The use of CRF funds is restricted by statute. For example, at least 30% of the

annual appropriation must be used for Medicaid. Activities funded through CRF in the fiscal 2022 budget include the Tobacco Use Prevention and Cessation Program; the Cancer Prevention, Education, Screening, and Treatment Program; substance abuse treatment and prevention; the Breast and Cervical Cancer Program; Medicaid; tobacco production alternatives; legal activities; and nonpublic school support.

The MSA includes an additional adjustment to states' annual payments known as the nonparticipating manufacturer (NPM) adjustment. For the NPM adjustment to be applied, participating manufacturers (PMs) must show that they experienced a demonstrable market share loss of over approximately 2%, that the MSA was a significant factor in that loss, and that a state was not diligently enforcing its qualifying statute. The MSA allows PMs to pursue this adjustment on an annual basis.

Litigation regarding the NPM adjustment started in 2005, beginning with the NPM adjustment for sales year 2003. Maryland was one of six states found via arbitration to *not* have diligently enforced their qualifying statute and subsequently forfeited a portion of the State's escrow funds. A three-judge panel is expected to make a decision in an ongoing multistate arbitration including Maryland regarding sales year 2004 in early 2021. The outcome of this litigation and the outcomes in cases for sales year 2005 and beyond have potentially significant budgetary impacts for the State's CRF revenue.

As of January 2021, there was approximately \$245.3 million attributed to principal held on behalf of Maryland in a disputed payments account. If the State were found to have diligently enforced the statute beginning in sales year 2005 and in the following years, at least this amount could be realized in revenue. Alternatively, Maryland could forfeit these funds and see its MSA payment adjusted downward in certain fiscal years if the State is found to be nondiligent, as occurred in fiscal 2014 for sales year 2003.

Background: For additional information on Maryland's HBCUs and *The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.* (06-CV-02773-CCB), see the **Appendix – Maryland's Historically Black Colleges and Universities**.

State Fiscal Effect: General fund expenditures increase in fiscal 2022 for DLS to hire a consultant to study MHEC at a total cost of up to \$150,000 (for purposes of this fiscal estimate, expenditures are scored in fiscal 2022, but some may be expended in fiscal 2023). As shown in **Exhibit 1**, general fund expenditures increase by an estimated \$60.8 million in fiscal 2023 (not including any DLS expenditures) and by approximately \$61.7 million annually through fiscal 2031; MHEC staffing costs continue annually thereafter, and residual HBCU settlement funding is distributed in fiscal 2032. To the extent CRF revenues are available in any year, general fund expenditures decrease by a corresponding amount. HBCU revenues increase by *at least* \$57.7 million from fiscal 2023

through 2031 (except in fiscal 2023 when a portion of revenues is used to pay attorney’s fees and expenses) and by the remainder of the \$577.0 million in fiscal 2032. HBCU expenditures increase correspondingly but may vary from year to year. Special fund revenues and expenditures from the HBCU Reserve Fund also likely increase as explained below.

Exhibit 1
Estimated General Fund/Cigarette Restitution Fund Expenditures
Fiscal 2023-2026
(\$ in Thousands)

	<u>FY 2023</u>	<u>FY 2024</u>	<u>FY 2025</u>	<u>FY 2026</u>
MHEC Positions	10			
BSU ¹	\$10,572	\$17,598	\$17,605	\$17,607
CSU ¹	5,667	9,000	9,000	9,000
MSU ¹	15,113	24,851	24,863	24,872
UMES ¹	6,103	9,325	9,318	9,317
Attorney’s Fees and Expenses ²	22,032	0	0	0
MHEC Staffing	781	804	833	863
Document Management	428	32	32	17
Other Operating Costs	57	7	7	7
Total GF/CRF Expenditures³	\$60,753	\$61,618	\$61,658	\$61,684

BSU: Bowie State University
CRF: Cigarette Restitution Fund
CSU: Coppin State University
GF: general fund

MHEC: Maryland Higher Education Commission
MSU: Morgan State University
PM: participating manufacturer
UMES: University of Maryland Eastern Shore

¹This estimate reflects estimated full-time equivalent students at historically black colleges and universities (HBCUs) as projected by the Department of Legislative Services. Actual distribution of the \$577.0 million depends on actual enrollment. The bill mandates each HBCU receive at least \$9.0 million annually for fiscal 2024 through 2031. Mandated funding ends in fiscal 2032.

²Attorney’s fees and expenses reflect the most recent court filing by the plaintiff’s attorneys for fees and expenses. The actual amount cannot be less than \$14.0 million and can be no more than \$25.0 million. This amount is subtracted proportionately from the distributions to HBCUs in fiscal 2023.

³General fund expenditures may be partially offset to the extent that the separate CRF account established by the bill receives payments as a result of PM litigation.

Notes: Funding is contingent on execution of a final settlement agreement, as specified, by June 1, 2021, in the case of *The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.* Excluding the document management costs, all expenditures are mandated. Numbers may not sum to total due to rounding. Does not reflect general fund expenditures of up to a total of \$150,000 in fiscal 2022 and potentially fiscal 2023 for the Department of Legislative Services to hire a consultant to study the capacity and capability of MHEC.

Source: Department of Legislative Services

The following information and assumptions are used in this estimate.

Historically Black Colleges and Universities – Allocations and Attorney’s Fees and Expenses

- The bill mandates a total of \$577.0 million be distributed to HBCUs from fiscal 2023 through 2032 (over 10 years) as specified in the bill. These funds must be used for the purposes specified in the bill.
- The bill specifies the distribution of \$59.5 million to the HBCUs for fiscal 2023. However, in fiscal 2023, the bill also requires that between \$14.0 million and \$25.0 million in attorney’s fees and expenses be taken from the HBCU allocation based on each institution’s share of the total funds provided under the bill. For the purposes of this estimate, it is assumed that attorney’s fees and expenses are \$22.0 million, which reflects the most recent 2017 filing with the District Court by the plaintiff’s attorneys for attorney’s fees and expenses.
- From fiscal 2024 through 2031, at least \$57.7 million is distributed each year to HBCUs based on the share of students enrolled during the immediately preceding academic year at each HBCU compared to the total number of students enrolled at all HBCUs. Over this period, each HBCU must receive at least \$9.0 million annually; thus, in years in which an HBCU receives additional funding due to the \$9.0 million minimum, the HBCUs will receive more than \$57.7 million in total.
- In fiscal 2032, the remainder of the \$577.0 million must be distributed to the HBCUs based on the share of students enrolled during the immediately preceding academic year at each HBCU compared to the total number of students enrolled at all HBCUs.
- The fiscal 2023 allocation in the bill is based on full-time equivalent (FTE) enrollment, which includes full-time and part-time students. The allocations in Exhibit 1 reflect DLS projections of FTE enrollment by campus in the out-years. The actual distributions will be based on actual annual enrollment at HBCUs.
- HBCU revenues increase as discussed above. Funds are not required to be spent in the year that they are received; thus, expenditures may vary by year. At the end of each fiscal year, any unused funds provided under the bill must be distributed to the HBCU Reserve Fund established by the bill.
- To the extent funds are distributed to the HBCU Reserve Fund, special fund revenues and expenditures increase. The amount cannot be estimated and likely

varies from year to year. Money deposited to the fund may only be used for purposes specified in the bill.

- This estimate does not reflect the impact of any tuition revenue due to programs established at HBCUs or any impact on other institutions' tuition revenue. Any such impact cannot be reliably estimated; however, it is likely overall minimal because the public four-year institutions are selective and can adjust their student enrollment using admissions policies.

Cigarette Restitution Fund Account

General fund expenditures for the HBCUs may be partially offset by funds from the separate CRF account consisting of additional payments that may be received by the State as a result of PM litigation. Maryland is currently in arbitration over sales year 2004. If the arbitration panel finds that Maryland diligently enforced its qualifying statute, the State will receive \$16.0 million from escrow as early as April 2021; however, the timing of the ruling and any payment to the State is uncertain.

Under the bill, if and when the State receives payment, funds must accrue to the new CRF account. To the extent a balance accrues in the account, the Governor must use the funds to supplant general fund expenditures for HBCUs, which decreases general fund expenditures for HBCUs and increases CRF expenditures correspondingly.

In future years, any funds received from PM ongoing litigation related to the NPM adjustment (a total of \$245.3 million is held in escrow related to disputed payments) may accrue to the account and must be used to supplant general fund expenditures for HBCUs. The exact amount or timing of such revenues cannot be reliably estimated at this time.

Maryland Higher Education Commission

- This estimate reflects MHEC hiring 10 full-time staff specialists (at three different levels) for the new program evaluation unit as required by the bill. The estimate assumes that all staff are hired on July 1, 2022 (fiscal 2023) and reflects full-time salaries and fringe benefits as well as start-up costs and other operating costs. Future year expenditures reflect 10 full-time salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses. Annual funding for 10 full-time staff is mandated by the bill.
- MHEC advises that it requires a new document management system to efficiently operate and manage the new program evaluation unit. This estimate includes one-time programming (\$128,900), software (\$143,120), and equipment (\$155,696) costs totaling an estimated \$427,716 in fiscal 2023. Future years reflect ongoing

programming and software costs associated with the system as well as additional programming costs in fiscal 2024 and 2025. This funding is not mandated by the bill.

- MHEC charges a fee to public and private institutions for each academic program proposal or modification submitted to MHEC for review. These fee revenues are considered special funds. Thus, special fund revenues to MHEC likely increase due to HBCUs submitting more program proposals that require review during the settlement period. The amount cannot be reliably estimated, but any increased fee revenues may be used to offset general fund support to MHEC as under current law.

Reports and Studies

- To the extent HBCUs hire a consultant to collectively develop academic programming, HBCU higher education expenditures increase in fiscal 2022. This amount cannot be reliably estimated, but it may be significant. However, HBCUs can repay any costs with additional funds received from the State in fiscal 2023.
- USM has proposed to support Maryland's HBCUs in developing online courses through the Kirwan Center and UMUC Ventures, a 501(c)(3) organization affiliated with University of Maryland Global Campus, at an estimated value of \$5.0 million per year beginning in fiscal 2023. USM advises that, as needed, UMUC Ventures and its associated portfolio companies and assets will play a foundational role in collaborative program development, online learning back office enterprise technology, instructional design and learning assessment, and data systems and associated learning analytics for intervention and overall student success. Further, the USM Kirwan Center will manage the project, supporting day-to-day operations (contracting, budgeting, evaluation, and the like) as well as collaborations among the HBCUs and between the HBCUs and other postsecondary institutions across Maryland to be optimally effective and efficient. Alternatively, some of the funding distributed to HBCUs under the bill may be used. Such costs cannot be reliably estimated at this time.
- DLS must hire a consultant to study the capacity and capability of MHEC to carry out current policies and practices and any new policies or practices established in accordance with the bill. For the purpose of this estimate, it is assumed that DLS general fund expenditures increase by up to \$150,000 in fiscal 2022. The interim report is due by December 1, 2021, (fiscal 2022) and the final report by September 1, 2022, (fiscal 2023). Thus, there may be expenditures in fiscal 2022 and 2023; however, total costs are not anticipated to exceed \$150,000. These costs

cannot be offset by CRF funds. Actual costs will depend on the funds made available and the bids received from consultants.

Additional Information

Prior Introductions: A similar bill, HB 1260 of 2020, was passed by the General Assembly but it was vetoed by the Governor. Its cross file, SB 1043 of 2020, was referred to the Senate Budget and Taxation Committee and the Senate Education, Health, and Environmental Affairs Committee. Although it was heard by the Senate Budget and Taxation Committee, it received no further action.

Designated Cross File: HB 1 (The Speaker) - Appropriations.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Higher Education Commission; University System of Maryland; Morgan State University; St. Mary's College of Maryland; Board of Public Works; Department of Legislative Services

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Appendix – Maryland’s Historically Black Colleges and Universities

In 2020, the General Assembly passed legislation (House Bill 1260 of 2020) mandating an additional \$577 million for Maryland’s historically black colleges and universities (HBCUs) over a 10-year period if certain conditions are met. The Governor vetoed the legislation. The legislation was intended to bring about resolution of a 14-year lawsuit in which the State has been a defendant. The plaintiff, which represents current and former HBCU students, alleges that policies of the State’s higher education system are in violation of federal law. To date, there has been no final decision or resolution of the lawsuit.

Litigation Continues

The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al. (06-CV-02773-CCB) is a lawsuit in the U.S. District Court for the District of Maryland in which the State of Maryland has been a defendant for the last 14 years. Former and current students of Maryland’s HBCUs, which include Bowie State University, Coppin State University, and the University of Maryland Eastern Shore within the University System of Maryland, and Morgan State University (MSU), allege that the State, through ongoing policies and practices within the State’s system of higher education, violated the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The case is currently on appeal in the U.S. Court of Appeals for the Fourth Circuit. As discussed below, the parties have attempted to settle the case in lieu of further litigation.

De Jure Segregation and Unnecessary Program Duplication

The coalition’s lawsuit identified three alleged policies of the Maryland system of higher education that the coalition argued were traceable to the prior *de jure* (as a matter of law) system of segregation that existed before 1969: (1) limited institutional missions; (2) operational funding deficiencies; and (3) unnecessary program duplication. The District Court rejected the first two claims raised by the coalition but found that the State failed to eliminate a traceable *de jure* era policy of unnecessary program duplication that has exacerbated the racial identifiability of Maryland’s HBCUs.

The District Court, applying the law established by the U.S. Supreme Court in *United States v. Fordice*, defined unnecessary program 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) Master of Business Administration (MBA) program over the objections of MSU in 2005 as an example of how the State failed to prevent additional unnecessary duplication. Of note, TU and UB did not renew the memorandum of understanding regarding the MBA program when it expired in October 2015, resulting in the program reverting back to UB.

Settlement Attempts

The case remains unresolved after years of mediation, attempted negotiations, and a 2017 District Court Memorandum Opinion and Order on remedies. In February 2018, the Governor proposed a \$100 million settlement to be allocated over a 10-year period beginning in fiscal 2020 that would supplement State appropriations to Maryland HBCUs. In fall 2019, the plaintiffs rejected this proposal and offered to settle the case for \$577 million to be “spread over a reasonable time period.” The coalition specified that these funds would be used to develop and launch new programs, hire faculty, and provide scholarships. The coalition’s proposed settlement amount was based on the *Ayers* case, which was a 1975 class action lawsuit directed against the state of Mississippi and its university system for operating a dual system of universities that discriminated on the basis of race. In 2001, a settlement agreement was reached in which the state of Mississippi agreed to pay \$397.1 million to the state’s three HBCUs. It was unclear, however, based on the coalition’s letter, exactly how the proposed \$577 million settlement amount was determined.

In September 2019, the Governor proposed a “final offer” to settle the lawsuit for \$200 million allotted over a 10-year period starting in fiscal 2021; however, this offer was also rejected.

Legislation Mandating Funding for HBCUs Vetoed by Governor

During the 2020 legislative session, the General Assembly passed House Bill 1260, which was intended to settle the lawsuit by mandating additional funding to HBCUs in addition to other initiatives. On May 7, 2020, the Governor vetoed the bill due to economic challenges resulting from the COVID-19 pandemic.

Specifically, the bill authorized an additional \$577 million to support HBCUs, contingent on final settlement of the lawsuit by December 1, 2020. The bill provided a supplemental \$58 million annually for HBCUs (based on a percentage share of full-time equivalent students enrolled during the immediately preceding academic year) from fiscal 2022 through 2031 to be distributed and used for specific purposes, including scholarships and financial aid support services, faculty recruitment and development, expanding and improving existing academic programs, development and implementation of new academic programs, academic support, and marketing. The bill also created a new academic program

evaluation unit in the Maryland Higher Education Commission and established other provisions relating to oversight and improvement of HBCUs.

Further, the bill authorized the Attorney General to execute a final settlement agreement on behalf of the State that resolves the lawsuit. Section 1 of the bill, which included all of the provisions discussed above, was contingent on (1) execution of the final settlement agreement by December 1, 2020, that satisfied the conditions specified in the bill; (2) receipt of notice of the settlement agreement by December 11, 2020; and (3) issuance of an order by December 11, 2020, by the U.S. District Court for the District of Maryland or the U.S. Court of Appeals for the Fourth Circuit that reversed or vacated the District Court's holding that the State failed to eliminate traceable *de jure* era policy of unnecessary program duplication or that held that any policy of unnecessary program duplication traceable to *de jure* segregation has been cured by the terms of the settlement agreement.

Current Status of Litigation

On July 24, 2020, the U.S. Court of Appeals requested a status report in the lawsuit regarding ongoing settlement efforts. On August 24, 2020, counsel for the plaintiffs responded that they continue to be committed to settling the case through the work of the Maryland legislature during the 2021 legislative session. Regardless of how the General Assembly proceeds, if the parties are unable to reach a settlement agreement, the case will continue to be litigated in federal appellate court.