

Department of Legislative Services
 Maryland General Assembly
 2020 Session

FISCAL AND POLICY NOTE
 Third Reader - Revised

House Bill 1260

(The Speaker, *et al.*)

Appropriations

Budget and Taxation and Education, Health,
 and Environmental Affairs

Historically Black Colleges and Universities - Funding

This bill, contingent on final settlement of *The Coalition for Equity and Excellence in Maryland Higher Education v. Maryland Higher Education Commission* lawsuit by December 1, 2020, provides an additional \$57.7 million annually for Maryland’s historically black colleges and universities (HBCUs) from fiscal 2022 through 2031 (a total of \$577 million) to be distributed and used as specified. 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. **The bill takes effect July 1, 2020; most of the bill’s provisions are contingent on the execution of a final settlement agreement as specified by December 1, 2020, in the HBCU lawsuit.**

Fiscal Summary

State Effect: Assuming a final settlement is reached, general fund expenditures increase by \$58.9 million in FY 2022. Future year expenditures reflect elimination of one-time costs, ongoing staffing costs, and \$57.7 million for HBCUs annually through FY 2031. HBCU revenues and expenditures increase correspondingly (not shown below). Special fund revenues and expenditures likely increase. **This bill establishes mandated appropriations beginning in FY 2022.**

(\$ in millions)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
SF Revenue	\$0	-	-	-	-
GF Expenditure	\$0	\$58.9	\$58.5	\$58.5	\$58.5
SF Expenditure	\$0	-	-	-	-
Net Effect	\$0.0	(\$58.9)	(\$58.5)	(\$58.5)	(\$58.5)

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 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. MHEC, 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 in equal amounts in each fiscal year from 2022 through 2031; and (3) allocated among the institutions. The specified provisions of the bill ensure that Maryland's HBCUs receive this support.

Maryland Higher Education Commission

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 2022, 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 2022, the Governor must include in the annual State operating budget general funds of at least:

- \$16,790,700 for BSU;
- \$7,212,500 for CSU;

- \$24,003,200 for MSU; and
- \$9,693,600 for UMES.

For each of fiscal 2023 through 2031, the Governor must include in the annual State operating budget general funds of at least \$57.7 million to be allocated to the HBCUs 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.

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 2022 through 2032, 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 Comptroller must account for the fund. The fund is a special, nonlapsing fund that consists of any funds unused at the end of a fiscal year that is 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.

The State Treasurer must invest the money of the fund in the same manner as other State money may be invested. Any interest earnings of the fund must be credited to the fund.

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 December 1, 2020, 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 2022, the Governor must provide an allocation for the attorney's fees and expenses – the amount of those fees and expenses specified in the final settlement agreement. That amount must come from the funds for the 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, are 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 v. MHEC* (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 December 11, 2020: (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 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, 2020, each institution must submit a report on its efforts and any findings that summarizes the steps taken to comply with the requirement.

MHEC Study

MHEC must, in consultation with MSU, USM, and St. Mary's College of Maryland, study 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. By December 1, 2020, MHEC must submit a report on its findings that summarizes the results of the study conducted.

HBCU 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, 2020, each institution must submit a report on its efforts and any steps taken to comply.

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.

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.

Background: For the past 13 years, the State of Maryland has been a defendant in a lawsuit brought by a coalition representing former, current, and prospective students at Maryland's HBCUs alleging that policies of the State's higher education system are in violation of federal law. After a federal District Court found in part for the coalition, there has been no final resolution of the case. If the parties do not reach an agreement, the case will move back to the federal appeals court for further litigation.

Lawsuit Regarding Maryland's Historically Black Colleges and Universities Continues

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 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 ensued in 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 (OCR) found the State to be in violation of Title VI of the Civil Rights Act of 1964. The coalition's lawsuit identified three alleged policies of the Maryland system of higher education, which the coalition argued were traceable to the prior *de jure* system: (1) limited institutional missions; (2) operational funding

deficiencies; and (3) unnecessary program duplication. (The court rejected a fourth claim of capital funding deficiencies before the case went to trial.) The District Court rejected the first two claims raised by the coalition but found that the State had failed to eliminate *unnecessary* program duplication for Maryland's HBCUs and concluded that this policy was traceable to the *de jure* segregation era.

Unnecessary Program Duplication

The District Court, applying the law established by the U.S. Supreme Court in *United States v. Fordice* (1992) 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) Master's 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.

Funding of HBCUs

The District Court found that, under Maryland's current funding system, HBCUs are not underfunded by the State relative to traditionally white institutions (TWIs); rather, the court found that Maryland appropriated slightly more per full-time equivalent (FTE) student at HBCUs than at TWIs. Further, the court determined that Maryland's HBCUs are funded at or above their peer-based funding targets.

In 2000, Maryland entered into a five-year partnership agreement with OCR to improve the educational opportunities at the State's four HBCUs. To achieve this end, the agreement specified \$59.9 million in State operating funding from fiscal 2001 through 2006, which included \$31.5 million in Access and Success funds; \$20.5 million for OCR enhancement funds; \$4.9 million in Private Donation Incentive Program funds; and \$3.0 million for development of a Master Plan and business incubator at BSU, information technology and a revitalization study at CSU, and an admissions and enrollment management consultant for each HBCU. In addition, \$369.5 million was provided for capital projects at HBCUs.

Although the partnership agreement expired in December 2005 (fiscal 2006), the State has continued to allocate funds to HBCUs for the operating of programs. Furthermore, the State has permanently incorporated into the HBCU base budgets Access and Success (since fiscal 2007) and OCR enhancement funds (since fiscal 2019). In total, from fiscal 2007 through the fiscal 2021 allowance, \$181.1 million additional operating funding has been provided, including \$90.0 million in Access and Success funds, \$90.0 million in OCR

funding, and \$1.1 million in Private Donation Incentive Program funds. Additionally, from fiscal 2001 through the fiscal 2021 allowance, \$1.1 billion was allocated for capital projects at the State's four HBCUs. **Appendix 1** provides the total allocations by HBCU.

Potential Settlement

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. The coalition rejected this proposal.

In September 2019, the attorneys representing the coalition submitted a letter to the President of the Senate and Speaker of the House proposing a settlement amount of \$577 million "spread over a reasonable time period." The coalition specified that the 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, 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. The settlement amount included \$35 million in private endowment funds that HBCUs were intended to raise and \$2.25 million for attorney fees. However, DLS notes that it is unclear from 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 coalition's lawsuit for \$200 million allotted over a 10-year period starting in fiscal 2021.

MHEC Program Approval

MHEC is responsible for approving academic programs offered by public and private two- and four-year institutions (both in-state and out-of-state institutions) to Maryland students. The number of submitted academic proposals increased 64.1% overall over the five most recently completed fiscal years, from 348 in fiscal 2015 to 571 in fiscal 2019. During that period, in-state proposals increased 93.4% and the number of out-of-state proposals decreased 78.7%. MHEC reports that it currently has 2.0 FTE staff dedicated to reviewing academic program proposals, down from 4.0 FTEs in fiscal 2015.

State Fiscal Effect: As shown in **Exhibit 1**, general fund expenditures increase by an estimated \$58.9 million in fiscal 2022 and by approximately \$58.5 million annually thereafter (through fiscal 2031 for the HBCU settlement funds). HBCU revenues increase by \$57.7 million from fiscal 2022 through 2031; HBCU expenditures increase correspondingly but may vary from year to year. Special fund revenues and expenditures also likely increase as explained below.

Exhibit 1
Estimated General Fund Expenditures
Fiscal 2022-2025
(\$ in Thousands)

	<u>FY 2022</u>	<u>FY 2023</u>	<u>FY 2024</u>	<u>FY 2025</u>
MHEC Positions	10			
BSU ¹	\$10,379	\$16,850	\$16,890	\$16,926
CSU ¹	4,458	7,210	7,217	7,217
MSU ¹	14,838	23,964	23,950	23,938
UMES ¹	5,992	9,676	9,644	9,618
Attorney Fees and Expenses ²	22,032	0	0	0
MHEC Staffing	731	749	775	802
Document Management	428	32	32	17
Other Operating Costs	55	6	6	6
Total GF Expenditures	\$58,914	\$58,487	\$58,513	\$58,525

BSU: Bowie State University
CSU: Coppin State University
GF: general fund

MHEC: Maryland Higher Education Commission
MSU: Morgan State University
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 \$57.7 million depends on actual enrollment. Mandated funding ends in fiscal 2031.

²Attorney fees and expenses reflect the most recent court filing by the plaintiffs' 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 2022.

Note: Funding is contingent on the execution of a final settlement agreement, as specified, by December 1, 2020, in the case of *The Coalition for Equity and Excellence in Maryland Higher Education v. Maryland Higher Education*. Excluding the document management costs, all expenditures are mandated.

Source: Department of Legislative Services

The following information and assumptions are used in this estimate.

Reports and Studies

- To the extent HBCUs hire a consultant to collectively develop academic programming, HBCU higher education expenditures increase in fiscal 2021. 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 2022.

- 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 million per year beginning in fiscal 2021 that will lead to the development of 20 to 25 courses. The number of courses is contingent on an analysis of current program gaps and duplication between institutions. As part of this process, USM would examine where programmatic gaps exist and create and/or leverage new and existing programs; analyze investments needed to move existing under-enrolled and under-utilized programs online; review marketing and enrollment needs; perform a needs assessment for both academic support and back office operations; and perform data collection and analysis for strategic decision making. Alternatively, some of the funding distributed to HBCUs under the bill may be used. Such costs cannot be reliably estimated at this time.
- MHEC, in consultation with the public four-year institutions, can study its current policies and practices and any new policies or practices using existing resources.

Maryland Higher Education Commission

- This estimate reflects MHEC hiring 10 full-time staff specialists for the new program evaluation unit as required by the bill. The estimate assumes that all staff are hired on July 1, 2021 (fiscal 2022), 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 2022. Future years reflect ongoing programming and software costs associated with the system as well as additional programming costs in fiscal 2023 and 2024. 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.

HBCU Allocations and Attorney's Fees and Expenses

- The bill mandates \$57.7 million be distributed to HBCUs from fiscal 2022 through 2031, for a total of \$577.0 million over 10 years. These funds must be used for the purposes specified in the bill.
- However, in fiscal 2022, 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.
- In fiscal 2023 through 2031, the \$57.7 million is distributed 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. The fiscal 2022 allocation in the bill is based on FTE enrollment, which includes full-time and part-time students. Exhibit 1 reflects DLS projections of FTE enrollment by campus in the out-years. The actual distributions will be based on actual annual enrollment at HBCUs.
- This estimate assumes the HBCU settlement funding is *not* used to calculate the higher education funding formulas for community colleges and nonprofit four-year institutions, since the settlement funding is for a limited duration. If this funding were used to calculate the formulas, general fund expenditures for the higher education funding formulas would increase by approximately \$22 million annually from fiscal 2023 through 2031. In fiscal 2022 the increase would be less due to the attorney's fees and expenses.
- 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 TWI 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.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 1043 (Senator Sydnor, *et al.*) - Budget and Taxation and Education, Health, and Environmental Affairs.

Information Source(s): Maryland Higher Education Commission; University System of Maryland; Department of Budget and Management; Department of Legislative Services

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Appendix 1
Additional State Operating and Capital Funds for Maryland HBCUs, by HBCU

	<u>FY 2001-06</u>	<u>FY 2007-21</u>	<u>Total</u>
OCR Enhancement Funds	\$20,500,000	\$90,000,000	\$110,500,000
Private Donation Incentive Program ¹	4,854,771	1,065,017	5,919,788
Access and Success Funds ²	31,500,000	90,000,000	121,500,000
Other Funding ³	3,033,475	0	3,033,475
Capital ⁴	369,473,840	1,129,094,479	1,498,568,319
Operating Funds			
Bowie State University	\$13,139,798	\$17,322,194	\$30,461,993
University of Maryland Eastern Shore	13,348,615	24,625,116	37,973,731
Coppin State University	18,656,785	10,545,996	29,202,781
Morgan State University	14,743,048	22,071,710	36,814,758
Capital Funds			
Bowie State University	\$42,849,724	\$205,015,571	\$247,865,295
University of Maryland Eastern Shore	76,066,536	195,276,571	271,343,107
Coppin State University	101,071,580	321,149,286	422,220,866
Morgan State University	149,486,000	407,653,051	557,139,051

HBCUs: historically black colleges and universities

OCR: U.S. Department of Education's Office for Civil Rights

¹Provided matching funds. Program ended in fiscal 2012.

²Beginning in fiscal 2007, funding was included in the base funding for each HBCU.

³Included funding for Bowie State University for Master Plan Development and a business incubator, Coppin State University for information technology and revitalization, and admissions and enrollment management consultant for each HBCU.

⁴\$216.2 million related to projects specified in OCR agreement in fiscal 2001 through 2006 funding amounts, and \$294.5 million related to projects specified in OCR agreement in fiscal 2007 through 2021 funding amounts.

Source: Department of Legislative Services