

**STATE OF MARYLAND
OFFICE OF THE GOVERNOR**



September 26, 2019

Delegate Darryl Barnes, Chair
Maryland Legislative Black Caucus
6 Bladen Street, Room 300
Annapolis, Maryland 21401

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TTY USERS CALL VIA MD RELAY

Re: The Coalition for Equity and Excellence in Maryland Higher Education, et al. v.
Maryland Higher Education Commission, et al. (“Coalition Case”)

Dear Chair Barnes:

This is in response to your September 11, 2019, letter regarding the ongoing 13-year HBCU lawsuit. The governor’s Chief of Staff Matthew Clark, his Senior Advisor Keiffer Mitchell, and I are ready and willing to meet with you to discuss the status of this matter and, as appropriate, possible solutions at your earliest convenience.

You referenced a letter the Caucus apparently received from Michael Jones, the Plaintiffs’ lawyer, expressing a willingness to settle the litigation, but without providing any significant detail, context, or even a timeframe for payment. In addition to failing to present a comprehensive settlement offer. Mr. Jones’ letter contains numerous misstatements and material distortions. The only plausible explanation for so grossly politicizing this matter is that Mr. Jones has come to realize he will likely never get the outcome he is looking for from the courts. None of this is helpful in resolving this matter, and it leaves out an important side of the story. While I know you are well-aware of these facts, I am compelled to provide a balanced view of these issues.

1. The state’s investment in HBCUs continues to rise and outpace support for traditional institutions.

There is little doubt Maryland has a past replete with discrimination against African-Americans in many areas, including higher education. The district court’s opinion describes these policies which, by 1900, had evolved into a separate and unequal system under which African-American citizens were afforded very limited and lesser educational opportunities. Moreover, even as these issues were recognized, the State was unacceptably slow to address these inequalities.

Nevertheless, it is critical that any resolution of this case recognize the significant strides made by the State of Maryland to remedy these historic inequities over the administrations of the last four governors working with their partners in the legislature. Maryland has expanded the roles and missions of Maryland’s HBCUs, increasing both their operating and capital funding, and has taken positive steps to address program duplication — all commenced prior to the filing

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of the lawsuit in 2006, and continued and enhanced over the last five years by the Hogan Administration. As the district court noted in 2013, "...Maryland has maintained a policy of enhancing HBCU mission and programming at least since the 1970s in an effort to mitigate the effects of *dejure* discrimination."

The court found that the HBCUs were, in fact, funded at a higher level than Maryland's traditional institutions. Since Fiscal Year 2002, state support for Maryland's HBCUs far exceeded the growth rate for the state's other public four-year institutions. Moreover, between 1999 and 2019, Maryland devoted more than \$1.3 billion in capital funds and \$195.6 million in enhanced operating funds to the HBCUs. The \$1.3 billion capital fund figure compares with \$185 million in the decade prior to 1999. The \$195.6 million in enhancement funds alone is above and beyond the regular budgets for the HBCUs. None of these enhancement funds were available to Maryland's traditional institutions. Simply put, the HBCUs are better funded than most of the traditional institutions, and will continue to be. (See attached Funding History.)

Since 1999, the State devoted almost \$1.5 billion to redress the vestiges of discrimination in its public higher education system. This is more than three times the amount of the settlement in *Fordice*, a case which, unlike the situation in Maryland, involved a state that maintained, at the time of the decision, an entirely dual system, one black, one white. By contrast, Maryland's system of public higher education is, except for the HBCUs, fully integrated, which the lower court expressly recognized.

The Plaintiffs' lawyers simply want to ignore the almost two decades of investment totaling more than \$1.5 billion that Maryland has made in the HBCUs. By their own methodology, the obligation has already been financially satisfied. While refusal to recognize these investments defies common sense, and I am sure would come as a surprise to those governors and members of the General Assembly like you who fought for and obtained this funding, we remain committed to an equitable solution.

2. The court ruled against the Plaintiffs on nine of their ten claims.

The lower court ruled against the Plaintiffs on nine of their ten claims. (See attached Disposition of Substantive Claims.) While both sides appealed, no appellate court has ruled to date. Most significantly, this case is not about historic underfunding as is frequently claimed. The lower court found no constitutional violations as to either operational or capital funding. The single claim on which the Plaintiffs prevailed was "program duplication." The Plaintiffs' lawyer wants to leverage a loss of 90% of his case into a 100% win, demanding damages as if he had actually won the claims he lost.

3. Maryland's higher education landscape has changed dramatically over the last 20 years.

Much has changed in Maryland higher education since these issues began to be seriously addressed in 2001, and since the Coalition Case was filed in 2006. Today, the University System of Maryland is 41.9% Caucasian, 42.3% minority (the remainder declined to answer or belong to smaller minorities). Fully 25% of the System's students are African-American. In this regard, it is worth noting that Maryland's traditional institutions educate twice as many African-Americans as the HBCUs. There are 15,578 African-Americans at the HBCUs while there are 33,755 African-Americans at the traditional institutions. These realities make policy-based funding decisions more difficult for Maryland's leaders.

4. Serious policy issues remain unresolved as to how best to integrate the HBCUs.

The lower court stated: "All parties need to recall that this case is not about the institutions but about the constitutional right of students to attend any public college or university for which they are qualified without being required to accept racial segregation at that institution. Maryland's traditional institutions already meet that standard of integration; Maryland's HBIs do not. This means that the remedy needs to be designed to integrate the HBCUs."

Changes in American higher education in recent years made the policy choices to integrate the HBCUs difficult. Student choice expanded as to both brick and mortar and online schools. Students are more mobile. One significant result of these changes and increased choices is that nationally many smaller schools, such as Maryland's HBCUs, have suffered from declining enrollments which threaten their viability. School size and location are arguably more significant than specific program offerings, which are putatively at issue in the litigation. Moreover, robust out-of-state online competition made program duplication on geographically close campuses an increasingly less relevant concept in higher

5. Maryland faces substantial budget challenges and many worthy demands on available funds.

According to the non-partisan Department of Legislative Services, the State will have a cash shortfall between FY 21 and FY 24 of about \$5 billion. This forecast includes only about 10% of the proposed Kirwan Commission spending on K-12 education. By any standard Maryland faces a serious budget crisis.

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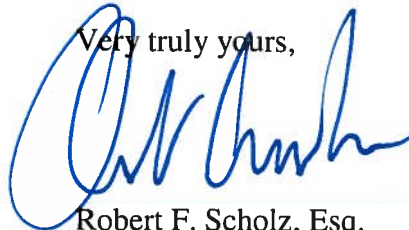
6. Governor Hogan remains committed to a settlement exponentially higher than the O'Malley Administration's best proposal.

Governor Hogan remains interested in resolving this matter with a comprehensive settlement. No governor in the history of the state ever invested more in HBCUs in his first five years in office. Recall that in January 2018, the Hogan-Rutherford Administration offered 2½ times the amount proposed by the O'Malley Administration to settle the case. Governor Hogan is prepared to make a final offer to resolve this case of up to \$200 million in funds over a ten year period, commencing in fiscal year 2021. This amount—five times Governor O'Malley's last offer—would supplement the state's continued record support for HBCUs.

A settlement on this basis would remove the very substantial litigation risk that the Plaintiffs now face, and is more than what the Plaintiffs would likely achieve even if successful someday at the end of the litigation. Obviously, any settlement must be negotiated between the parties, resolved with the courts, and included in a to be negotiated settlement agreement.

We ask for your leadership to help facilitate a practical, fair, and just outcome for all Marylanders.

Very truly yours,



Robert F. Scholz, Esq.
Chief Legal Counsel

Funding History of HBCUs 2001-2019

Operating Funding:

<u>Operating Budget Increases by Full-time Equivalent Changes: 2001-2019</u>		<u>FY 2019 FTE Operating Funding</u>
Coppin State University	233%	\$20,349
University of Maryland Eastern Shore	101%	\$14,584
Morgan State University	70%	\$14,310
Bowie State University	37%	\$8,941
University of Maryland, Baltimore County	48%	\$11,407
University of Maryland College Park (flagship)	25%	\$15,419
Towson University	29%	\$6,328

Capital Funding:

Capital Funding by full time equivalent (2001-2019)

Coppin State University	\$133,839
Morgan State University	\$79,757
Bowie State University	\$61,239
University of Maryland Eastern Shore	\$52,671
University of Maryland College Park (flagship)	\$31,889
University of Maryland, Baltimore County	\$39,705
University of Baltimore	\$31,222
Towson University	\$23,077
 Total Capital funding of HBCIs (2001-2019) =	 \$1,348,506,000
(1990-1999) =	\$185,000,000

Coalition for Equity and Excellence in Maryland Higher Education, et al.
v. Maryland Higher Education Commission, et al.

Status of Claims as of July 2019

Breach of Contract	Resolved in Favor of the State	Decision of Judge Garbis Document No. 57 August 20, 2008
Intentional Discrimination	Resolved in Favor of the State	Decision of Judge Blake Document No. 242 June 6, 2011
Constitutional Violations in Recruitment Practices	Resolved in Favor of the State*	Decision of Judge Blake Document No. 242 Page 8, n. 10 June 6, 2011
Constitutional Violations in Admissions Practices	Resolved in Favor of the State*	Decision of Judge Blake Document No. 242 Page 8, n. 10 June 6, 2011
Constitutional Violations Related to Retention Rates at HBIs	Resolved in Favor of the State	Decision of Judge Blake Document No. 242 Page 8, n. 10 June 6, 2011
Constitutional Violations Related to Graduation Rates at HBIs	Resolved in Favor of the State	Decision of Judge Blake Document No. 242 Page 8, n. 10 June 6, 2011
Constitutional Violations in Capital Funding	Resolved in Favor of the State **	Decision of Judge Blake Document No. 242 Page 9; see also Document No. 382, Pages 40-41 June 6, 2011
Constitutional Violations in Operational Funding	Resolved in Favor of the State **	Decision of Judge Blake Document No. 382 Pages 3, 24, 43 October 7, 2013
Constitutional Violations Relating to Missions and Dual Missions	Resolved in Favor of the State **	Decision of Judge Blake Document No. 382 Pages 24, 27-29, 32-33 October 7, 2013
Constitutional Violations Relating to Program Duplication	Resolved in Favor of the Plaintiffs ***	Decision of Judge Blake Document No. 382 Pages 3, 24, 44, 59 October 7, 2013

*Plaintiffs withdrew claim during oral argument.

**Appealed by plaintiffs

***Appealed by State of Maryland