



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Jason S. Miyares
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

February 25, 2022

The Honorable A. C. Cordoza
Member, Virginia House of Delegates
Post Office Box 14545
Newport News, Virginia 23608

Dear Delegate Cordoza:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You ask what forms of state financial assistance may legally be provided to Historically Black Colleges and Universities (HBCUs) in the Commonwealth, particularly private HBCUs.

Response

While the Constitution of Virginia, as a general matter, prohibits state appropriations to private colleges and universities in Virginia, it provides certain exceptions that permit the General Assembly to provide particular forms of support to such institutions. Under the terms of these exceptions, the General Assembly is authorized under the State Constitution to appropriate funds for the benefit of students in furtherance of collegiate or graduate education at qualifying private HBCUs. The General Assembly also is authorized to appropriate funds for the support of qualifying private HBCUs through properly procured public contracts. Moreover, the Constitution provides authority for the Virginia College Building Authority to assist qualifying private HBCUs in borrowing to construct educational facilities.

Finally, the General Assembly has nearly unfettered authority to provide state financial assistance to public HBCUs in the Commonwealth.

Applicable Law and Discussion

Article VIII, § 10 of the Constitution of Virginia provides generally that “[n]o appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision”¹ Further, Article IV, § 16 of the Constitution of Virginia provides generally that the General Assembly “shall not make any appropriation of public funds, personal property, or real estate to . . . any association or institution of any kind whatever which is entirely or partly,

¹ VA. CONST. art. VIII, § 10.

directly or indirectly, controlled by any church or sectarian society” or make any “like appropriation to any charitable institution which is not owned or controlled by the Commonwealth.”²

While these provisions generally prohibit appropriations of state funds to private HBCUs in the Commonwealth, the Constitution sets out several exceptions that authorize the General Assembly to provide certain forms of support to these institutions. The effect of these exceptions is that while direct institutional appropriations is prohibited, a range of options exist that permit the General Assembly to provide certain forms of financial support to private HBCUs in Virginia. In particular, the General Assembly may make appropriations *for the benefit of students* at private HBCUs, as set forth under the terms of Article VIII, § 10 and § 11 of the State Constitution. The General Assembly may also appropriate funds for the support of qualifying private HBCUs through properly procured public contracts. Additionally, the Virginia College Building Authority, a state bond issuing authority, may assist qualifying HBCUs in borrowing to construct educational facilities.

The terms of these provisions permitting the General Assembly to provide certain forms of financial support for private HBCUs in Virginia, including the specific criteria by which private HBCUs may qualify for state financial assistance, are set forth and explained more fully below.

A. State Financial Support for the Benefit of Students at Private HBCUs

Article VIII, § 10 of the Virginia Constitution provides that “the General Assembly may . . . subject to such limitations [as it may impose], appropriate funds for educational purposes which may be expended in furtherance of . . . collegiate or graduate education of Virginia students in . . . nonsectarian private schools and institutions of learning.”³ Under this provision, provided a private HBCU is nonsectarian, the General Assembly may make appropriations for the benefit of students at the institution, without restriction as to the “type of funding or the method of appropriation.”⁴ As a prior opinion of this Office has concluded, this provision permits the General Assembly to appropriate funds, such as loan or grant funds: (1) directly to students, (2) directly to the qualifying institution on behalf of the student, (3) to the State Council of Higher Education for Virginia (SCHEV), or (4) to some other agency created by General Assembly to distribute the funds.⁵

Article VIII, § 11 of the Virginia Constitution provides separate authority for the General Assembly to provide funds for the benefit of students at private HBCUs in Virginia. This provision states that “[t]he General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education.”⁶ Under this provision, the General Assembly may provide the described support even if the private HBCU is sectarian; however, the institution must have not have the primary purpose of providing religious training or theological education.

² VA. CONST. art. IV, § 16.

³ VA. CONST. art. VIII, § 10.

⁴ 2008 Op. Va. Att’y Gen. 22, 23.

⁵ *Id.*

⁶ VA. CONST. art. VIII, § 11.

Examples of existing programs that provide state assistance to students at private HBCUs include SCHEV's Virginia Tuition Assistance Grant program (VTAG)⁷ and its Two-Year College Transfer Grant.⁸ Legislation is also currently pending before the General Assembly that would establish the HBCU Opportunity Fund, which is anticipated to provide scholarship funds exclusively for students at private HBCUs.⁹ While there is also legislation pending that would establish the Virginia Diverse Educator Scholarship Fund and Program, this legislation currently would apply only to students of public HBCUs.¹⁰ The General Assembly may consider expanding the Virginia Diverse Educator Scholarship Fund and Program to include private as well as public HBCUs.

B. Support of Private HBCUs through Public Contracting

Article VIII, § 11 states that the General Assembly may “provide for the Commonwealth or any political subdivision thereof to contract with [qualifying private institutions of higher education] for the provision of educational or other related services.”¹¹ This provision authorizes the General Assembly to appropriate funds for the support of qualifying private HBCUs through properly procured public contracts.

Legislation is currently pending in the General Assembly to expand the types of colleges and universities that may establish college partnership laboratory schools, and to provide that the State Board of Education shall give a substantial preference to any eligible HBCU (public or private) that seeks to establish a college partnership laboratory school.¹² The Laboratory Schools represent a mechanism by which the Commonwealth may partner with eligible HBCUs and their potential students through the support of Laboratory Schools.

C. Financing for Private HBCUs through the Virginia College Building Authority

In addition to authorizing the General Assembly to appropriate funds for the benefit of students, the Constitution of Virginia authorizes the General Assembly to assist qualifying private HBCUs with borrowing to construct educational facilities. Specifically, Article VIII, § 11 of the Virginia Constitution provides that the General Assembly may create an agency or authority to assist qualifying private institutions of higher education “in borrowing money for construction of educational facilities at such institutions,” provided “the Commonwealth shall not be liable for any debt created by such borrowing.”¹³ The General Assembly created the Virginia College Building Authority, which “provides a conduit

⁷ STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, *Virginia Tuition Assistance Grant Program*, <https://schev.edu/index/tuition-aid/financialaid/state-student-aid/tuition-assistance-grant-program> (last visited February 24, 2022).

⁸ STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, *Two-Year College Transfer Grant*, <https://schev.edu/index/tuition-aid/financialaid/state-student-aid/two-year-college-transfer-grant-program> (last visited February 24, 2022).

⁹ See House Bill 30, Item 142(L)(1) (2022 Sess.); Senate Bill 30, Item 142(L)(1) (2022 Sess.).

¹⁰ See House Bill 128 (2022 Session) (Committee substitute, 22105480D-H1), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+HB128H1+pdf>.

¹¹ VA. CONST. art. VIII, § 11. A qualifying private institution of higher education under Article VIII, § 11, is a nonprofit institution of higher education in the Commonwealth “whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education.”

¹² See Senate Bill 598 (2022 Sess.) (engrossed version, 22105876D-ES1), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+SB598ES1+pdf>. College partnership laboratory schools are public schools established by contract between the governing board of a college partnership laboratory school and the Board of Education. See VA. DEP'T OF EDUCATION, *College Partnership Laboratory Schools*, https://www.doe.virginia.gov/instruction/laboratory_schools/index.shtml (last visited Feb. 24, 2022).

¹³ VA. CONST. art. VIII, § 11.

financing mechanism for [qualifying] private, non-profit institutions of higher education in Virginia,” as well as serving as a financing tool for state institutions of higher learning.¹⁴

In order to qualify under Article VIII, § 11 of the Virginia Constitution, the private, non-profit institution of higher education in the Commonwealth must have a primary purpose of providing collegiate or graduate education and not to provide religious training or theological education.

While the focus of your request is the permissible scope of state financial support for private HBCUs in Virginia, you also seek guidance on state financial support of public HBCUs in Virginia. On January 8, 2009, Virginia received the Final Report from the U.S. Department of Education, Office for Civil Rights (“Final Report”) which “announce[d] that the Commonwealth’s system of public higher education, once segregated by law, has eliminated the vestiges of that formerly segregated system and operates in conformity with Title VI, applicable U.S. Supreme Court precedent, and all other law and regulation.”¹⁵ The Final Report does not end the Commonwealth’s responsibilities¹⁶ and commitment to public HBCUs. The General Assembly has nearly unfettered authority to provide financial support for public HBCUs and all students that attend them. The General Assembly should seek to fund the Commonwealth’s public HBCUs at high levels.¹⁷

Both the state and non-state HBCUs are valuable and irreplaceable components of the Commonwealth’s higher education system. According to U.S. News & World Report 2022 Best College Rankings, Virginia has four HBCUs that are listed in the top 50 HBCUs in the United States. In 2010, Hampton University celebrated the opening of the Hampton University Proton Therapy Institute (HUPTI) bringing with it a more precise way to target and kill tumors with limited side effects. HUPTI demonstrates the innovation and successes that HBCUs bring to the Commonwealth.

Conclusion

While the Constitution of Virginia, as a general matter, prohibits state appropriations to private colleges and universities in Virginia, it provides certain exceptions that permit the General Assembly to provide particular forms of support to such institutions. Under the terms of these exceptions, the General Assembly is authorized under the State Constitution to appropriate funds for the benefit of students in furtherance of collegiate or graduate education at qualifying private HBCUs. The General Assembly also is authorized to appropriate funds for the support of qualifying private HBCUs through properly procured public contracts. Moreover, the Constitution provides authority for the Virginia College Building Authority to assist qualifying private HBCUs in borrowing to construct educational facilities.

¹⁴ VIRGINIA DEP’T OF THE TREASURY, *Virginia College Building Authority*, <https://www.trs.virginia.gov/Boards-Authorities/Virginia-College-Building-Authority> (last visited Feb. 24, 2022); *see also generally* VA. CODE ANN. §§ 23.1-1220 to -1238 (2021).

¹⁵ *See* Letter from Maureen Riley Matsen, Deputy Attorney General, to Eddie N. Moore, Jr., President, Virginia State University, et al., dated August 27, 2009, enclosing the letter to the Honorable Timothy Kaine, Governor of Virginia and the Final Report on the Commonwealth of Virginia’s Implementation of the Accord Between the Commonwealth of Virginia and the United States Department of Education, Office for Civil Rights, January 8, 2009.

¹⁶ The Final Report on the Commonwealth of Virginia’s Implementation of the Accord Between the Commonwealth of Virginia and the United States Department of Education, Office for Civil Rights dated January 8, 2009, p.19.

¹⁷ The lack of funds at both public and private HBCUs is exacerbated, in many cases, by lower endowment levels than that of non-HBCUs. The private sector may also want to consider enhanced investment and support of HBCUs.

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Finally, the General Assembly has nearly unfettered authority to provide state financial assistance to public HBCUs in the Commonwealth.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Jason S. Miyares', with a stylized flourish at the end.

Jason S. Miyares
Attorney General