

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BETHEL MINISTRIES, INC.,

*

Plaintiff,

*

v.

*

No. 1:19-cv-01853-ELH

DR. KAREN B. SALMON, *et al.*,

*

Defendants.

*

* * * * *

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Bethel's motion for a preliminary injunction to block the BOOST Board from enforcing the BOOST nondiscrimination requirement should be denied. As set forth below, Bethel cannot demonstrate any imminent or immediate harm because funding for the 2019-2020 school year has already been completed and there is no guarantee that the BOOST program will be funded next year; its authorization is passed on an annual basis in the Maryland state budget bill. Therefore, Bethel cannot demonstrate standing to seek preliminary relief at this time because it is not certain or imminent that the nondiscrimination requirement will ever again be applied to them. Moreover, Bethel has not appropriately limited its request for relief to address its underlying, as-applied claims.

Furthermore, Bethel is unlikely to succeed on the merits of its Free Exercise and Free Speech claims for all of the same reasons set forth in defendants' briefing supporting its motion to dismiss (ECF 16, 18), which are at this stage are not supported by any record evidence of discrimination by the BOOST Board. Fundamentally Bethel complains that it, like numerous other schools of varied religious backgrounds, was assessed for compliance with a generally applicable, religiously neutral nondiscrimination requirement. Bethel was found to be in violation of the nondiscrimination requirement, and, as a result, was deemed ineligible to receive future funding and was required to pay back, in compliance with the terms of the program, previously awarded funds. Bethel seeks to evade this straightforward application of a neutral law by claiming that it was targeted because its discriminatory conduct resulted from its sincerely held religious beliefs. But it has cited no law that would support such an assertion. To the contrary, the BOOST Board's

actions are consistent with the state's obligations under the Free Exercise and Free Speech clauses because they are regulation of conduct that is not specifically tied to religion or religious beliefs. This type of regulation of conduct under a neutral law has been upheld by the courts for decades, including in decades past when private educational institutions sought to benefit from public programs, including tax exemptions, despite carrying out segregationist policies.

Bethel's motion also should be denied because it cannot meet any of the equitable factors necessary for granting the extraordinary relief of a preliminary injunction. Bethel has not identified a risk of any immediate, irreparable harm. Bethel delayed 16 months from the adverse action it now alleges constituted the injury to its First Amendment rights. Bethel's decision to sit on its rights until after the funding cycle for 2019-2020 was concluded and all funds disbursed precludes Bethel from succeeding in a balance of the equities. In addition, Bethel has not asserted any direct infringement of its First Amendment rights. Bethel today retains the ability to speak and practice its religion as it sees fit, albeit without monetary support from the state. Finally, the public interest counsels against a premature injunction because the Maryland General Assembly has expressed an intent to curtail or discontinue the BOOST program if it is no longer able to ensure nondiscrimination by the institutions receiving BOOST funding.

FACTUAL AND STATUTORY BACKGROUND

The BOOST Program was enacted as part of the Fiscal Year 2017 Budget legislation. 2016 Md. Laws ch. 143 at 130-35. Since its inception, the BOOST Program funding levels and conditions have been set through Maryland's budget process and have

not been codified. Gunning Aff., ¶ 3, attached as Exhibit 1. The purpose of the BOOST Program is to “provide[] scholarships for students who are eligible for the free or reduced-price lunch program to attend eligible nonpublic schools.” 2016 Md. Laws ch. 143 at 131. Eligible student applicants are ranked by need, and the BOOST Advisory Board is charged with reviewing and certifying the applicants as well as setting scholarship amounts. *Id.* at 138-9. In Fiscal Year 2017, the budget provided \$5.5 million for the BOOST Program. *Id.* at 142. In Fiscal Year 2020, the most recent funding cycle, the budget provided \$6.58 million for the BOOST Program. 2019 Md. Laws ch. 565 at 151. It is unknown if the Boost Program will be funded for the 2020-2021 school year, and, if it is funded, how much money will be appropriated for the program or what the eligibility conditions may be. Ex. 1, Gunning Aff., ¶ 4.

The law also set forth eligibility requirements for nonpublic schools at which the scholarships can be used, including a requirement to (1) comply with Title VI of the Civil Rights Act of 1964; (2) comply with Title 20, subtitle 6 of the State Government Article, and (3) “not discriminate in student admissions on the basis of race, color, national origin, or sexual orientation.” *Id.* at 137. In the most recent legislative session, the requirements for the upcoming BOOST Program year were amended to require participating nonpublic schools “to not discriminate in student admissions, retention, or expulsion or otherwise discriminate against any student on the basis of race, color, national origin, sexual orientation, or gender identity or expression.” 2019 Md. Laws ch. 565 at 151.

The nondiscrimination requirement further specifies that nonpublic schools are not required “to adopt any rule, regulation, or policy that conflicts with its religious or moral

teachings.” 2016 Md. Laws ch. 143 at 137. This statement is subject to a modifying clause in the next sentence, which provides “[h]owever, all participating schools must agree that they will not discriminate” *Id.* If a participating school does not “agree that they will not discriminate in student admissions on the basis of race, color, national origin, or sexual orientation,” the school is required to “reimburse [the Maryland State Department of Education] all scholarship funds received under the BOOST Program and may not charge the student tuition and fees instead.” *Id.*

In program years 2016 and 2017, Bethel signed an assurance required by the Maryland State Department of Education (“MSDE”) that it has not and will not deny an application based on the applicant’s sexual orientation. ECF 19-3, ¶ 19. On October 11, 2017, the BOOST Board received written testimony from the Maryland Parent Teacher Association related to another school’s written policies that appeared to discriminate on the basis of sexual orientation in admissions. Ex. 1, Gunning Aff. at Attachment B. Shortly following that meeting, on October 13, 2017, Matthew Gallagher, the Chair of the BOOST Advisory Board, sent a letter requesting that all BOOST-eligible schools examine their written policies for compliance with the nondiscrimination requirement and the assurances that had been signed. ECF 19-14. The letter was sent to all BOOST-eligible schools at the time, including schools of various religious and non-religious affiliations. Ex. 1, Gunning Aff. ¶ 6;*id.* at Attachment A. In December 2017, MSDE requested handbooks from schools participating in BOOST and Bethel complied by providing its parent-student handbook for 2017-2018. ECF 19-3, ¶¶ 21, 23.

The 2017-2018 handbook examined by MSDE and the BOOST Board contains a section captioned “**ADMISSIONS POLICY.**” ECF 19-5, 8. Within the admissions policy, Bethel specifies, in addition to its admissions criteria, that “[p]arents must understand that continued enrollment of their child(ren) is dependent on their support of the school, its staff, and its policies.” *Id.* Directly following this statement, under a heading “**Statement of Nondiscrimination,**” Bethel specifies that it “admits students of any race, color, and national or ethnic origin to all the rights, privileges, programs, and activities” and that “[i]t does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies . . . and other school-administered programs.” *Id.* Bethel does not include sexual orientation or gender identity in its statement of nondiscrimination. *Id.* Instead, Bethel informs potential applicants that “[i]t should be noted, however, that Bethel Christian Academy supports the biblical view of marriage defined as a covenant between one man and one woman, and that God immutably bestows gender upon each person at birth as male or female to reflect His image.” *Id.* Bethel goes on to caution that “faculty, staff, and student conduct is expected to align with this view,” and requires faculty, staff, and students “to identify with, dress in accordance with, and use the facilities associated with their biological gender.” *Id.*

MSDE and the BOOST Advisory Board asked Bethel for further explanation about how Bethel reconciled its assurance that it did not discriminate based on sexual orientation with its policy language. Bethel responded by affirming that its statement about marriage and gender identity applies when “a student *has been admitted.*” ECF 19-7, 69. Bethel recognized that it communicated its “policy regarding *student conduct*” to potential

students because Bethel “believe[s] it is important that students and parents understand . . . the requirements of BCA Students.” ECF 19-8, 72. Bethel did not deny that a student could be subjected to expulsion after admission on the basis of sexual orientation status and expressly argued that a requirement regarding admissions could not extend to student conduct, even if a result of application of the discipline policy could result in expulsion. ECF 19-7, 19-8.

The BOOST Board deliberated for over an hour about whether Bethel’s admissions policy met the BOOST legislation’s nondiscrimination requirement in open session at its May 3, 2018 meeting. May 3, 2018 BOOST Advisory Board Meeting Video 43:00 to 1:57:00, available at <https://vimeo.com/368387715/85b45d8b3b>. Bethel was invited to present to the Board but did not attend. *Id.* at 1:30-2:15; 43:00 to 1:57:00. During the same meeting, the Board considered whether it would attempt to “clawback” money from schools already found to be in noncompliance with the BOOST nondiscrimination requirement, which at the time *did not include* Bethel. *Id.* at 03:00 to 4:00.

In follow-up to questions from the BOOST Board, on May 29, 2018, Bethel sent a second letter further explaining its own interpretation of its policies. ECF 19-9. There Bethel asserted that “[a]ny student . . . is welcome to join our school community regardless of religious beliefs, experience of same-sex attraction, sexual self-identification, past participation in same-sex behavior, beliefs about marriage, or beliefs about sexual morality.” *Id.* Bethel also emphasized that its “behavioral standards address student actions,” and that “sexual behavior of any type” was impermissible under those standards. *Id.* However, Bethel did not explain why its admission policy contained a

nondiscrimination statement that omitted sexual orientation as a class, or why it specifically mentioned conduct (same-sex marriage) only entered into by non-heterosexual students in the text of its admissions policy. *Id.* Bethel also did not explain why its statements in the letter about who was welcome to join the school were not reflected in its admissions policy. *Id.* While Bethel rejected the contention that it would *summarily* expel a student based on sexual orientation, it did not deny that “student actions,” which were undefined in the letter, could result in expulsion if the student could not be brought “into compliance with behavioral expectations.” *Id.* Again, Bethel did not explain what behaviors or student conduct would or would not align with Bethel’s beliefs about marriage, when its Admissions Policy expressly connected expectations of student conduct with those beliefs.

On June 21, 2018, the BOOST Board entered into closed session with a verbally stated reason to receive legal advice, returned to open session, deliberated further in open session, and voted unanimously to find Bethel was ineligible for the BOOST program. June 21, 2018 BOOST Advisory Board Meeting Recording Part I at 1:06:35 to 1:07:30, 1:08:15 to 1:08:33, available at <http://archives.marylandpublicschools.org/S/Audio/BOOSTMeeting%2006212018Audio1.mp3>; June 21, 2018 BOOST Advisory Board Meeting Recording Part II at 3:56 to 8:30, available at <http://archives.marylandpublicschools.org/S/Audio/BOOSTMeeting%2006212018Audio2.mp3>.

On August 8, 2018, the BOOST Board sent a letter to Bethel memorializing its decision and explaining that it had proceeded to examine Bethel’s admission policy on the principles that (1) a bona fide offer of admission necessarily entailed that the offer not be

extended with the understanding that the school would “discipline or expel a student because of the student’s sexual orientation, as this would make acceptance at the school illusory”; and (2) “[a] discipline policy that, on its face, singles out conduct or behavior based on the sexual orientation of the student for discipline or expulsion does violate the nondiscrimination clause contained in the BOOST law.” ECF 19-10. The letter further explained that discipline policies that prohibited certain conduct “without regard to sexual orientation” would not violate the nondiscrimination clause. *Id.* In examining Bethel’s policy, the Board concluded that Bethel’s requirement that students “align their conduct to the view of marriage as a covenant between one man and one woman (i.e., heterosexual)” meant that “[a] non-heterosexual student may reasonably view the policy as one that allows denial of admission or discipline or expulsion on the basis of his or her sexual orientation.” *Id.* The Board concluded that “this policy, on its face, was in conflict with the nondiscrimination clause contained in the BOOST law.” *Id.*

On December 12, 2018, the Maryland State Department of Education sent Bethel an invoice for the total scholarship amounts it received for the 2016-2017 school year and the 2017-2018 school year, \$102,600. ECF 1-10. The letter indicated that “[i]f the school can demonstrate that it is financially unable to pay this indebtedness in one lump sum, payment in installments may be arranged.” *Id.*

ARGUMENT

I. BETHEL’S REQUEST TO ENJOIN FUTURE APPLICATION OF THE BOOST NONDISCRIMINATION CLAUSE AS A WHOLE AND WITH RESPECT TO ALL POTENTIALLY ELIGIBLE SCHOOLS IS NOT AVAILABLE ON A PRELIMINARY BASIS.

“An injunction ‘should be tailored to restrain no more than what is reasonably required to accomplish its ends.’” *Hayes v. North State Law Enf’t Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) (citation omitted). Preliminary injunctive relief is “limited to the inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see also Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (“[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.” (citation omitted)).

Bethel has not so limited its request for relief and instead seeks to enjoin the BOOST Board and other MSDE employees “from enforcing their nondiscrimination requirement” with no limitation. ECF 19, 2. The nondiscrimination requirement prohibits discrimination on a number of grounds and Bethel, even if it could demonstrate likelihood of success on the merits (it cannot), has offered no reason to enjoin its application in the entirety. Moreover, the universe of potentially eligible schools encompasses schools with a wide range of religious and non-religious educational philosophies that may or may not be implicated by enforcement of the nondiscrimination clause, and which may or may not engage in protected expression.

Insofar as Bethel seeks to enjoin the application of a currently non-existent nondiscrimination clause applicable to the 2020-2021 school year, that future injunctive

relief is not available on a preliminary basis because it does not provide a foundation for Article III standing. “[S]tanding is not dispensed in gross”; at least one plaintiff in a litigation “must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citations omitted); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (plaintiffs “must demonstrate standing separately for each form of relief sought”); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000) (same); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06, and n. 7 (1983) (a plaintiff who has standing to seek damages must also demonstrate standing to pursue injunctive relief).

“A plaintiff who seeks . . . to enjoin a future action must demonstrate that he is immediately in danger of sustaining some direct injury as the result of the challenged official conduct.” *Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir.), *cert. denied sub nom. Beck v. Shulkin*, 137 S. Ct. 2307, 198 L. Ed. 2d 728 (2017) (citations and quotations omitted). Any future “threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *Id.* (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012)). Standing cannot be established by asserting “hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013). Here, for Bethel’s asserted future harm in the 2020-2021 to occur, the General Assembly would need to (1) include BOOST scholarship funding in the budget; and (2) include a nondiscrimination requirement in the same form as the 2019-2020 budget language. Then, Bethel would need to apply to the BOOST program and the BOOST Board would need to deny Bethel’s

eligibility before any asserted harm would occur. But such “a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.” *Clapper*, 568 U.S. at 410. Moreover, the Supreme Court has not “endorse[d] standing theories that require guesswork as to how independent decisionmakers [like the General Assembly] will exercise their judgment.” *Id.* at 413.

The purpose of “interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (internal citation omitted). Here, schools who wished to be considered eligible institutions for the 2019-2020 school year were required to apply to MSDE by December 31, 2018, and students were required to apply for BOOST scholarship funds by April 17, 2019. Ex. 1, Gunning Aff., ¶ 7. All funding for the 2019-2020 school year has been disbursed. *Id.* After 2,768 scholarships were awarded, 1,134 students remained on a wait list to receive BOOST scholarship funding. *Id.* There is no guarantee that the BOOST scholarship program will continue next year, or, if it does, what level of funding it will receive. *Id.* at ¶ 4. Because of the cyclical nature of the BOOST scholarship program, Bethel’s delay in seeking equitable relief, and the uncertainty of the General Assembly’s future action in continuing the BOOST program, the relief Bethel seeks is speculative and overly-broad and cannot be granted on a preliminary basis.

II. BETHEL CANNOT MEET THE HIGH STANDARD OF PROOF REQUIRED TO SECURE THE EXTRAORDINARY REMEDY OF A PRELIMINARY INJUNCTION.

Bethel's motion should also be denied because it has not satisfied the elements necessary to justify the extraordinary remedy of preliminary injunctive relief. As set forth below, Bethel has not established (1) that it is "likely to succeed on the merits;" (2) that it is "likely to suffer irreparable harm in the absence of preliminary relief;" (3) that "the balance of equities" tips in its favor; or (4) that an injunction "is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As the Supreme Court has cautioned, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quoting *Winter*, 555 U.S. at 24). Bethel must satisfy all four factors to be entitled to relief. *Winter*, 555 U.S. at 20. The grant of a preliminary injunction involves "the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (internal citation and quotation marks omitted).

This is especially true where, as here, the requested relief goes beyond restoration of "the last uncontested status between the parties which preceded the controversy." *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citation omitted). Such a mandatory injunction "is disfavored" "in any circumstance." *Id.* (quoting *Taylor v. Freeman*, 34 F.3d 266, 270 n. 2 (4th Cir.1994)). Here, even construing all facts in favor of Bethel, the last uncontested status between the parties occurred when Bethel was enrolled in the 2017-2018 BOOST voucher program.

E.g., ECF 19-10. Requiring, as Bethel has requested, the BOOST Board not to enforce the requirements for the BOOST program going forward would not restore, but rather disturb, the status quo ante because it cannot be accomplished by requiring the BOOST Board to “reverse its actions.” *Id.* (quoting *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012)). Rather, it would require the BOOST Board to accept a *new* application from Bethel—potentially out-of-time and after all scholarships for the 2019-2020 school year have been awarded.

III. BETHEL IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS FREE EXERCISE AND FREE SPEECH CLAIMS.

Bethel, through this suit, seeks to press a claim that has already been squarely rejected: Namely, that religious educational institutions are entitled to public subsidy, despite actively discriminating on prohibited bases, because their discrimination stems from sincerely held religious beliefs. That argument was rejected decades ago. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Norwood v. Harrison*, 413 U.S. 455 (1973) (“[i]nvidious private discrimination may be characterized as a form” of protected First Amendment expression, “but it has never been accorded affirmative constitutional protections”). The Supreme Court recently reiterated the basic principles that allow society to move forward in protecting newly recognized minorities when it stated that while “religious and philosophical objections are protected, it is a general rule that such objections do not allow . . . other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, 138

S.Ct. 1719 (2018); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995) (nondiscrimination provisions “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002) (noting that as a condition of state aid program held acceptable “[p]articipating private schools must agree not to discriminate”).

Bethel’s variation of this claim is that its assertions that it does not discriminate *must* be credited by BOOST (an agency charged with enforcement over a nondiscrimination law) despite the plain text of a discriminatory Admissions Policy, and that any administrative discretion in enforcement is forbidden because Bethel has explained the motivations for its actions are sincere religious beliefs. This is not the law. Moreover, the BOOST Board fully credited the sincerity of Bethel’s religious beliefs and respected Bethel’s right to hold and express those beliefs while simultaneously applying the General Assembly’s command that schools who discriminate based on sexual orientation in admissions not be the recipients of state funds. The BOOST Board has already thoroughly explained the legal basis why Bethel’s claims are unlikely to succeed on the merits given

the record, available on video and audio-recording, of the Board's decisionmaking process,¹ ECF 16-1; ECF 18, and hereby incorporates those arguments by reference.²

A. Bethel's Admissions Policy Is Conduct and Therefore the Proper Subject of Neutral Regulation.

The BOOST Board rested its determination that Bethel was not a BOOST-eligible school on the text of Bethel's admissions policy contained in the 2017-2018 Student-Parent Handbook. ECF 19-10. An admissions policy's language is *operative*, and therefore not speech. A policy is evidence of a "standard course of action that has been officially established by an organization" POLICY, Black's Law Dictionary (11th Ed. 2019); *see also Christian Legal Soc. Chapter of the Univ. of Cal. Hastings v. Martinez*, 561 U.S. 661, 696 (2010) (regulation of contents of policy is appropriate where the targeted conduct is "the *act* of rejecting would-be group members"). When Bethel asserts that it "has not, and will not, discriminate in admissions based on sexual orientation and gender identity," ECF 19-1, 25, the evidence it has actually produced shows only that Bethel "does not ask

¹ Defendants recognize this Court's determination that Bethel has plausibly stated a claim for relief. ECF 20, 21. However, Bethel's allegations are inconsistent with the record evidence Bethel has produced in support of its motion and therefore Bethel has not met its greater burden in demonstrating likelihood of success on the merits.

² Bethel limits its argument that it is likely to succeed on the merits to its Free Exercise and Free Speech claims, ECF 19-1, 23, but then purports to reserve their right to raise other claims in "later filings." *Id.* at n.13. Bethel's failure to present argument in its opening motion related to the other claims waives them for purposes of at least the preliminary injunction proceedings, purported reservation notwithstanding. *See, e.g., Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue.") (internal alterations omitted, quotation omitted).

about, or consider” student sexual orientation or gender identity in “student admissions decisions.” ECF 19-3, ¶¶ 8-9. But, as Ms. Dant, Bethel’s principal, has explained elsewhere, “she doesn’t know if the school has had any gay students,” and, if it does, “[n]one that have been so visible that it has been an issue or that we were aware of them.” Liz Bowie, *Maryland banned a school from voucher program over anti-LGBT views. It says that violates religious freedom*, THE BALTIMORE SUN (July 15, 2019), attached as Exhibit 2.

Ms. Dant’s observation squares with the discriminatory effect of the operative language of the admissions policy. That is, after publishing an admissions policy that makes clear that “faculty, staff, and student conduct” is “expected to align” with the “view of marriage defined as covenant between one man and one woman” and that “students are required to identify with, dress in accordance with, and use the facilities associated with their biological gender,” ECF 19-5, 8, Bethel does not *need* to take further action to ensure there are no non-heterosexual students “so visible that” Bethel became aware of them attending Bethel. This is precisely analogous to the example the Supreme Court used to explain how written policies are non-speech conduct in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (“FAIR”), of an employer who, incidental to the prohibition on discrimination on the basis of race in employment, may also be required “to take down a sign reading ‘White Applicants Only’” 547 U.S. 47, 62 (2006). Any employer who posted such a sign intended, and probably succeeded, in never having to actively reject a

non-white applicant—but no one would seriously argue that such an employer did not discriminate or that a government may not treat such a sign as non-speech conduct.

Bethel has produced no evidence that the BOOST Board sought to regulate any speech or other expressive conduct other than the operative content of its policies relevant to student admissions and conduct, to the extent those policies prohibited conduct inherently linked to sexual orientation or gender identity. (For example, requiring students to “identify with . . . their biological gender.”). The BOOST Board acted only after it received information from a third party who was concerned that the operative policies of several schools were in conflict with the assurances those schools had signed. Because the General Assembly made nondiscrimination on the basis of sexual orientation and, later, gender identity, a “condition[] that defines” the BOOST funding program, *see Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 217 (2013) (*AOSI*), it was proper for the BOOST Board to deny eligibility to receive student scholarship funding on that basis. Most other schools altered their operative policies to no longer discriminate in admissions and to continue to receive BOOST funding; Bethel chose not to. Bethel continues to express its views and continues its ministry of Bethel Christian Academy. None of Bethel’s theories that the BOOST Board infringed on its First Amendment rights under the Free Speech Clause is likely to succeed on the merits.

B. *Smith* Is Still Good Law and Enforcement Agencies Must Target Those who Disregard Neutral, Generally Applicable Laws.

Bethel is just as unlikely to succeed on its Free Exercise theories. There is nothing about “the right of free exercise” that “relieve[s] an individual of the obligation to comply

with a valid and neutral law of general applicability.” *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). And the fact that “conduct springs from sincerely held and strongly felt religious beliefs does not imply that the desire to regulate that conduct springs from antipathy to those beliefs.” *Fulton v. City of Philadelphia*, 922 F.3d 140, 159 (3d Cir. 2019). Views about marriage and gender are not solely religiously motivated. *E.g. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (sincerely held beliefs about marriage may stem from “religious or philosophical” views). Policies that prohibit discriminatory conduct against individuals because of their sexual orientation or gender identity are therefore not targeted at religion; they are targeted at the discriminatory conduct regardless of its moral, religious, philosophical or other motivation.

Bethel’s unsupported legal assertion that “[i]f it is impermissible to pass a law targeting religious beliefs (and it is), then it is equally impermissible to *apply* a law to target those same beliefs,” ECF 19-1, 25, misapprehends the nature of what it means to enforce a neutral law of general application. All enforcement activity requires targeting; it is, at its very essence, the application of a law to a target that may have violated that law. Bethel’s logic, that (1) it has been sanctioned because it discriminates; (2) it discriminates because of its religious beliefs; and (3) therefore it is being sanctioned for its religious beliefs, is a “syllogism . . . [that] runs directly counter to the premise of *Smith*.” *New Hope Family Servs., Inc. v. Poole*, No. 5:18-CV-1419, 2019 WL 2138355, at *11 (N.D.N.Y. May 16, 2019) (rejecting claim from foster care agency that requirement that it not discriminate against same-sex couples violated Free Exercise Clause).

Moreover, the comments of some BOOST Board members on which Bethel has relied on as evidence of “targeting” or hostility do not relate to religious beliefs at all. In fact, some of the comments do not relate to *Bethel* at all—Chair Gallagher stated “You mean caught up with the fact that they signed an assurance illegally?” during a discussion about schools that had already been determined to be ineligible for BOOST on May 3, 2018. May 3, 2018 BOOST Advisory Board Meeting Video 17:19-17:26, available at <https://vimeo.com/368387715/85b45d8b3b>. Bethel was not among that group; its eligibility was not even under discussion until after the discussion of appropriate remedy for *other* schools had concluded. *Compare id.* at 43:00 to 1:57:00 (the more than hour-long discussion regarding Bethel’s compliance). The other remarks on which Bethel has relied again do not mention or express any view about the content of beliefs, religious or otherwise, but are instead related to issues of enforcement discretion—the appropriate burden of proof and whether sex-stereotyping is evidence of sexual orientation discrimination. *Id.* at 1:18:29-1:19:22. It was only after deliberation occurred, and Bethel was invited to present its views, that the BOOST Board voted to deem Bethel ineligible to participate in the BOOST funding program.

The BOOST Board’s open discussion of difficult enforcement questions goes above and beyond the transparency requirements of Maryland’s open meetings law. *See, e.g.* Md. Code, Gen. Prov. § 3-306(b), (c) (public body may prepare recording but must prepare minutes); *see also* 7 OMCB Opinions 193 (2011) (sequential communications and one-on-one communications with chair not a meeting); 81 Op. Att’y Gen. 140, 142 (1996) (sequential e-mail communication not a meeting). For example, the discussion of whether

Bethel's requirement that students "identify" with and adhere to the dress code appropriate to their "biological gender," represents open grappling with a thorny area of law. As Ms. Dant noted in public comments, if there is a current student at Bethel who is gay that student "is invisible." Exhibit 2. An internal orientation often becomes visible through nonconformity with stereotypical gender norms, *e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (explaining the difficulty in discerning whether discrimination is because of "homosexuality," "effeminacy," or "both"), and whether and how prohibitions of discrimination based on sexual orientation implicate prohibitions of discrimination based on stereotyped gender norms is a genuine enforcement question.

None of the Supreme Court's recent jurisprudence supports a Free Exercise claim rooted solely in the enforcement of a nondiscrimination provision. Under *Lukumi*, a law departs from neutrality to target religious beliefs or practices only when "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Here, the object of the nondiscrimination law is to assure state funds do not support discriminatory practices, no matter their motivation. Under *Hosanna-Tabor*, states may not affirmatively prohibit a religious institution from "shap[ing] its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 188 (2012). But here, Bethel remains free to shape its own faith and mission according to its beliefs—unlike the scenario presented by *Hosanna-Tabor*, which involved application of employment laws and the ministerial exception, Maryland has not applied its general nondiscrimination requirements to penalize Bethel for noncompliance, it has merely enforced the terms of a

program to which Bethel voluntarily submitted. And unlike the church in *Trinity Lutheran*, Bethel was not excluded from competing for a funding opportunity solely because it is a religious institution. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). And, as the BOOST Board has already explained at length, its actions did not constitute the type of open hostility combined with actual discriminatory decisionmaking that the Court found impermissible in *Masterpiece Cakeshop*. 138 S. Ct. 1729-30.

Bethel was permitted to compete with and receive funding from a voluntary state-supported scholarship program on equal terms with non-religious private schools. When it did not conform to the conditions of the program, namely ensuring that its Admissions Policy conformed to the program's nondiscrimination requirements, it was deemed ineligible to receive funding, and, in accordance with the statutory provisions authorizing the program, it was required to pay back monies received. The Free Exercise clause does not extend to protect conduct from the enforcement of generally applicable, neutral laws merely because the conduct was motivated by sincerely held religious belief. Bethel is therefore unlikely to succeed on the merits of its Free Exercise claim.

C. This Court Need Not Apply Strict Scrutiny, But the BOOST Board Had a Compelling State Interest In Enforcing its Nondiscrimination Requirements to Prevent Stigmatic Harm to Vulnerable Populations from Flowing From the Use of State Funds.

Because the BOOST Board acted only with respect to Bethel's conduct, and not speech, strict scrutiny does not apply. Nonetheless, even if it did, Maryland had a compelling state interest in enacting the BOOST nondiscrimination requirement and the

BOOST Board had a compelling interest in enforcing it, as explained at ECF 16-1, 28-31 and ECF 18, 15-16 and hereby incorporated.

Bethel continues to argue that the BOOST nondiscrimination clause is under-inclusive because public schools are not analogously prohibited from discrimination. This is untrue. Maryland law prohibits discrimination *on any characteristic* in public school admissions. “All individuals who are 5 years old or older and under 21 shall be admitted free of charge to the public schools of this State.” Md. Code Ann., Educ. § 7-101 (LexisNexis 2018). There are no exceptions; all students, regardless of any status they may hold or may be attributed to them, “shall be admitted” to Maryland public schools. And, it is the law in the District of Maryland that entities subject to Title IX, like Maryland public schools, may not discriminate on the basis of transgender status. *M.A.B. v. Board of Educ. of Talbot County*, 286 F. Supp. 3d 704, 715 (D. Md. 2018). This law was in place at the time the General Assembly expanded the BOOST nondiscrimination requirement in 2019 to apply to gender identity and to apply more broadly to discrimination, not just discrimination in admission.

Moreover, Bethel misconstrues the BOOST Board’s compelling state interest, which is in preventing the stigmatic harm that arises from government endorsement of discrimination in education. The State’s goal of “eliminating discrimination and assuring its citizens equal access to publicly available goods and services,” when “unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). These interests are heightened in the educational context; “[u]nder *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686,

98 L.Ed. 873 (1954), discriminatory treatment exerts a pervasive influence on the entire educational process.” *Norwood*, 413 U.S. at 469. The impact of exclusion from an educational institution “is greater when it has the sanction of the law,” because state-sanctioned exclusion from educational opportunities can impose a “sense of inferiority” that “affects the motivation of a child to learn.” *Brown v. Board of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955). There is *no* mechanism, and Bethel has not identified one, ECF 19-1, 36, by which the BOOST Board may further this interest other than by enforcing the BOOST nondiscrimination requirement when it has been violated. The Board has done nothing that would even approach “full censorship of certain religious viewpoints,” *id.*, it has merely enforced the General Assembly’s judgment that state aid should not be given to institutions, regardless of the basis of their views, that discriminate in admissions against students based on their sexual orientation (and now, more broadly discriminate based on sexual orientation or gender identity). Schools that do not discriminate may express all the viewpoints that they wish, and schools that wish to continue to discriminate are free to do so without material aid from the state.

IV. BETHEL CANNOT ESTABLISH THE OTHER PRELIMINARY INJUNCTION FACTORS.

A. While First Amendment Injuries are Generally Regarded as Irreparable Harms, the Presumption Does Not Hold When the Injury is Past and Plaintiffs Delay in Seeking Relief.

“[A] preliminary injunction does not follow as a matter of course from a plaintiff’s showing of a likelihood of success on the merits.” *Benisek v. Lamone*, 138 S. Ct. 1942,

1943-44 (2018). Plaintiffs must also demonstrate that each of the other factors is met, including a demonstration of “more than just a ‘possibility’ of irreparable harm.” *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008)). While plaintiffs are correct that when, “at the time relief [is] sought,” “First Amendment interests [are] either threatened or in fact being impaired,” irreparable harm is generally presumed, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), those circumstances are not present here. Unlike, for example, a business establishment faced with license revocation, Bethel has not demonstrated any “‘direct penalization, as opposed to incidental inhibition’ of First Amendment rights” that would require preliminary injunctive relief. *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir.1989)). Bethel has not changed any of its speech as a result of the BOOST Board’s decision and Bethel has not asserted that its religious exercise through the operation of Bethel Christian Academy is jeopardized by the loss of BOOST Scholarship funding.³

Moreover, Bethel delayed in seeking preliminary relief. As discussed below, Bethel’s delay, which was within its control, is a reason to deny preliminary equitable relief. Courts have also found a delay between the action which allegedly infringes First

³ Bethel’s supporting affidavits demonstrate that any effect on enrollment is merely incidental. While Bethel asserts its enrollment has declined from the 2017-2018 school year through the 2019-2020 school year, Ms. Dant attributes less than 15% of that decline to loss of BOOST scholarship students. ECF 19-3, ¶¶ 38, 40, 43. Currently 1,134 students were placed on a wait list for BOOST scholarship funding for the 2019-2020 school year. Ex. 1, Gunning Affidavit ¶ 5.

Amendment rights and the filing of a motion for preliminary relief to be evidence that an asserted First Amendment injury is not irreparable. *See, e.g., Preston v. Bd. of Trs. of Chicago State Univ.*, 120 F. Supp. 3d 801 (N.D. Ill. 2015) (finding plaintiff failed to establish irreparable harm where he did not move for a preliminary injunction until 15 months after the alleged First Amendment violation); *Doe v. Banos*, 713 F. Supp. 2d 404 (D.N.J. 2010), *aff'd on other grounds*, 416 F. App'x 185 (3d Cir. 2010) (delay in seeking preliminary injunctive relief undermined claim of immediate and irreparable harm); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201 (D. Utah 2004), *aff'd*, 425 F.3d 1249 (10th Cir. 2005) (finding no irreparable injury where plaintiffs waited three months after their complaint was filed to seek preliminary injunction); *Shady v. Tyson*, 5 F. Supp. 2d 102 (E.D.N.Y. 1998) (considering delay in denying injunctive relief). Here, Bethel was determined ineligible to receive BOOST scholarship proceeds at the June, 21, 2018 Board Meeting. But Bethel waited an entire year to file its complaint in this action and then an additional four months, for a total of 16 months, to bring its motion for preliminary injunction. That is, Bethel voluntarily subjected itself to the harm it now asserts is immediate and irreparable for 16 months without seeking relief. Bethel's present request for preliminary relief may be denied solely on that basis.

B. The Balance of the Equities Tips Against Bethel.

“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). Moreover, “a party requesting a preliminary injunction must generally show reasonable diligence.”

Benisek, 138 S. Ct. at 1944. Where, like here, “delay largely arose from a circumstance within plaintiffs’ control,” namely the timing of Bethel’s filings, the balance of the equities tips against the party seeking injunctive relief. *Id.*

Bethel’s 16 month delay has created additional equitable concerns. Funding for the 2019-2020 school year has already been disbursed in full and 1,134 students remain on a waiting list. Ex. 1, Gunning Affidavit ¶ 5. If Bethel were awarded preliminary relief requiring MSDE to allow it to receive BOOST scholarship funding, but Bethel ultimately failed to succeed in obtaining a permanent injunction, Bethel might ultimately benefit from funds for which it was ineligible or MSDE might be required to pursue additional collections to recoup funds. The balance of the equities tips in favor of the Board because it suffers irreparable injury from an injunction preventing it from enforcing the duly enacted laws of Maryland and because Bethel’s own delay heightened the effects of that injury. *See Benisek*, 138 S. Ct. at 1944 (affirming denial of preliminary relief despite First Amendment claims where equitable factors weighed against plaintiffs).

C. The Public Interest Favors the BOOST Board.

The public interest, like all of the *Winters* factors, requires an independent demonstration and its assessment cannot be collapsed into a consideration of likelihood of success on the merits. *Pashby v. Delia*, 709 F.3d 307, 330 (4th Cir. 2013) (it is permissible to find “likelihood of success on the merits satisfied the public interest prong only if other considerations did not meaningfully weigh on that factor.”).

Here, additional considerations, separate from the merits, must be meaningfully weighed. Delegate Maggie McIntosh, Chair of the Maryland House Appropriations

Committee, has publicly stated that if Bethel were to prevail in this suit, “I think you would find a strong movement in the legislature to end BOOST. We are just not going to use tax dollars to discriminate against anyone.” Ex. 2. Del. McIntosh’s comments followed a contentious fight over the BOOST Scholarship Program funding level in the 2019 Session, where the House and Senate disagreed over the level of funding that should be allocated based on concerns that the money was being diverted from public schools and a desire to strengthen nondiscrimination requirements. Danielle E. Gaines, *Big Senate Debate Over a Small Allocation—For Private Schools*, MARYLAND MATTERS (March 21, 2019), available at <https://www.marylandmatters.org/2019/03/21/big-senate-debate-over-a-small-allocation-for-private-schools/>. Other recipients of BOOST program funds have stated that “[t]o take the Program away would hurt thousands of low-income and minority students and in doing so threaten the stability of” institutions that receive BOOST scholarship funds. Ex. 2. If an injunction is granted on a preliminary basis, it could accelerate the General Assembly’s reassessment of the utility of the BOOST program based only on a preliminary conclusion about the merits of this case.

CONCLUSION

WHEREFORE, for the reasons stated herein, defendants respectfully request that plaintiff’s motion for a preliminary injunction be denied.

Respectfully submitted,

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/s/ Sarah W. Rice

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November 14, 2019

Attorneys for State Defendants

CERTIFICATE OF SERVICE

I certify that, on this 14th day of November, 2019 the foregoing was served by CM/ECF on all registered CMF users.

/s/ Sarah W. Rice

Sarah W. Rice

Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BETHEL MINISTRIES, INC.,

*

Plaintiffs,

*

v.

*

No. 1:19-cv-01853-ELH

DR. KAREN B. SALMON, *et al.*,

*

Defendants.

*

* * * * *

AFFIDAVIT OF DONNA GUNNING

I, Donna Gunning, do solemnly declare and affirm under the penalties of perjury this 14th day of November, 2019, that the following facts are true and correct based upon my personal knowledge:

1. I am over the age of 18 years and am competent to testify as a witness.
2. I am the Executive Director for the Maryland State Department of Education Office of Policy and Fiscal Analysis, a position I have held since September 2018. I have worked for the Maryland State Department of Education since July 2000. My principle duties as Executive Director entail providing fiscal policy and analysis supervision and direct management support to programs within MSDE, including the Broadening Opportunities and Options for Students Today (BOOST) program, and managing MSDE's Fiscal Note responses to the Maryland General Assembly. As Executive Director, I have personal knowledge of the matters set forth herein that occurred subsequent to September

6. I have examined the records of MSDE, and from that examination and based on my knowledge and belief of the practices of MSDE, the October 13, 2017 letter from Matthew Gallagher to BOOST-Eligible Schools was sent to the list of schools attached as Exhibit A.

7. Upon my review of the file, the Maryland Parent Teacher Association submitted written testimony to the BOOST Board in 2017, declaring that at least one school which had been deemed BOOST-eligible and had signed and submitted an assurances document, had policies that expressly discriminated against students based on the sexual orientation of the child's parents. A copy of this written testimony is attached as Exhibit B. It was after this testimony was received that the BOOST Board sought information from BOOST-eligible schools regarding their handbooks and other admissions policies.

I declare under penalty of perjury that the foregoing is true and correct.

11/13/19

Dated _____



Donna Gunning

Attachment A



**Potential Participating Schools for the BOOST Scholarship Program
2017-2018 School Year**

THIS IS NOT A FINAL LIST OF ELIGIBLE SCHOOLS FOR THE 2017-2018 BOOST PROGRAM. This list represents schools that meet the criteria for participating in the Nonpublic Textbook Program and offering programs beyond kindergarten. To become fully eligible, schools must certify that they: administer certain assessments, will provide certain assessment results, and comply with certain non-discrimination laws.

As of September 29, 2017

| School Name | |
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| ACADEMY CHILD DEVELOPMENT CENTER - ROCKVILLE | |
| AL HUDA SCHOOL - COLLEGE PARK | |
| AL RAHMAH SCHOOL - BALTIMORE | |
| ALEF BET MONTESSORI SCHOOL - BETHESDA | |
| ALIM ACADEMY AKA MUSLIM COMMUNITY SCHOOL THE - POTOMAC | |
| ALPERT FAMILY ALEPH BET JEWISH DAY SCHOOL - ANNAPOLIS | |
| ARCHBISHOP BORDERS SCHOOL - BALTIMORE | |
| ARCHBISHOP CURLEY HIGH SCHOOL - BALTIMORE | |
| ARCHBISHOP NEALE ELEMENTARY SCHOOL- LA PLATA | |
| ARCHBISHOP SPALDING HIGH SCHOOL - SEVERN | |
| ARNOLD CHRISTIAN ACADEMY - ARNOLD | |
| ARTS AND IDEAS SUDBURY SCHOOL - BALTIMORE | |
| ARUNDEL CHRISTIAN SCHOOL - HANOVER | |
| ATHOLTON ADVENTIST ACADEMY - COLUMBIA | |
| BAIS HAMEDRASH AND MESIVTA OF BALTIMORE - BALTIMORE | |
| BAIS YAAKOV SCHOOL FOR GIRLS - BALTIMORE | |
| BALTIMORE ACTORS THEATRE CONSERVATORY THE - BALTIMORE | |

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| BALTIMORE JUNIOR ACADEMY - BALTIMORE | |
| BALTIMORE SCHOOL OF INDEPENDENT LEARNERS - PIKESVILLE | |
| BALTIMORE TORAH SCHOOL - BALTIMORE | |
| BALTIMORE WHITE MARSH ADVENTIST SCHOOL - ROSEDALE | |
| BANNER SCHOOL THE - FREDERICK | |
| BEDDOW HIGH SCHOOL THE - ACCOKEEK | |
| BEDDOW SCHOOL INC THE - WALDORF | |
| BEDDOW SCHOOL INC THE - FT WASHINGTON | |
| BEGINNINGS MONTESSORI SCHOOL - CUMBERLAND | |
| BETHEL CHRISTIAN ACADEMY - SAVAGE | |
| BISHOP MCNAMARA HIGH SCHOOL - FORESTVILLE | |
| BISHOP WALSH MIDDLE HIGH SCHOOL - CUMBERLAND | |
| BNOS YISROEL OF BALTIMORE - BALTIMORE | |
| BOWIE MONTESSORI CHILDRENS HOUSE - BOWIE | |
| BROADFORDING CHRISTIAN ACADEMY - HAGERSTOWN | |
| BROOKWOOD SCHOOL - KENSINGTON | |
| BUTLER SCHOOL - DARNESTOWN | |
| CALVARY CHRISTIAN ACADEMY - CRESAPTOWN | |
| CALVARY LUTHERAN SCHOOL - BALTIMORE | |
| CALVERT HALL COLLEGE HIGH SCHOOL - BALTIMORE | |
| CAMBRIDGE SCHOOL - BALTIMORE | |
| CARDINAL HICKEY ACADEMY - OWINGS | |
| CARDINAL SHEHAN SCHOOL - BALTIMORE | |
| CARROLL LUTHERAN SCHOOL - WESTMINSTER | |
| CATHEDRAL CHRISTIAN ACADEMY - BALTIMORE | |
| CATHOLIC HIGH SCHOOL OF BALTIMORE THE - BALTIMORE | |

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| CELEBRATION CHRISTIAN ACADEMY - COLUMBIA | |
| CENTER FOR CREATIVE LEARNING THE - BALTIMORE | |
| CHABAD OF PARK HEIGHTS - BALTIMORE | |
| CHESAPEAKE CHRISTIAN SCHOOL - EASTON | |
| CHESTER RIVER ADVENTIST SCHOOL - CHESTERTOWN | |
| COLUMBIA ACADEMY ELEMENTARY AND MIDDLE SCHOOL - COLUMBIA | |
| COUNTRYSIDE CHRISTIAN SCHOOL | |
| CREST LANE SCHOOL - WESTMINSTER | |
| CRISTO REY JESUIT HIGH SCHOOL - BALTIMORE | |
| DARCHEI NOAM MONTESSORI | |
| DEMATHA CATHOLIC HIGH SCHOOL - HYATTSVILLE | |
| DON BOSCO CRISTO REY HIGH SCHOOL - TAKOMA PARK | |
| EBENEZER CHRISTIAN SCHOOL - HAGERSTOWN | |
| ELIZABETH SETON HIGH SCHOOL - BLADENSBURG | |
| ELVATON CHRISTIAN ACADEMY - MILLERSVILLE | |
| EMMANUEL LUTHERAN SCHOOL - BALTIMORE | |
| FAIRHAVEN SCHOOL - UPPER MARLBORO | |
| FIRST BAPTIST SCHOOL OF LAUREL | |
| FORCEY CHRISTIAN SCHOOL - SILVER SPRING | |
| FREDERICK ADVENTIST ACADEMY - FREDERICK | |
| FREDERICK COUNTRY DAY - FREDERICK | |
| FRIENDS MEETING SCHOOL - IJAMSVILLE | |
| GEORGE E PETERS SDA ELEM SCHOOL - HYATTSVILLE | |
| GERMAN SCHOOL WASHINGTON D C - POTOMAC | |
| GLA ACADEMY "SCHOOL OF EXCELLENCE" - ROSEDALE | |
| GLENWOOD COUNTRY DAY SCHOOL - MT. AIRY | |

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| GOOD SHEPHERD SCHOOL - PERRYVILLE | |
| GRACE ACADEMY - HAGERSTOWN | |
| GRACE CHRISTIAN ACADEMY OF MARYLAND - WALDORF | |
| GRACE LUTHERAN SCHOOL - LA PLATA | |
| GREATER GRACE CHRISTIAN ACADEMY - BALTIMORE | |
| GREATER YOUTH ACADEMY - BALTIMORE | |
| HIGHLAND PARK CHRISTIAN ACADEMY - LANDOVER | |
| HIGHLAND VIEW ACADEMY - HAGERSTOWN | |
| HOLY ANGELS ELEMENTARY SCHOOL - BALTIMORE | |
| HOLY CROSS SCHOOL - GARRETT PARK | |
| HOLY FAMILY SCHOOL - HILLCREST HEIGHTS | |
| HOLY REDEEMER SCHOOL - COLLEGE PARK | |
| HOLY TRINITY EPISCOPAL DAY SCHOOL - GLENN DALE | |
| IMMACULATE CONCEPTION SCHOOL - TOWSON | |
| IMMACULATE CONCEPTION SCHOOL - ELKTON | |
| IMMACULATE HEART OF MARY SCHOOL - BALTIMORE | |
| INSTITUTE OF NOTRE DAME - BALTIMORE | |
| ISLAMIC COMMUNITY SCHOOL - BALTIMORE | |
| ISRAEL HENRY BEREN HIGH SCHOOL - BALTIMORE | |
| JEWELS SCHOOL | |
| JOHN CARROLL SCHOOL - BEL AIR | |
| JOHN NEVINS ANDREWS SCHOOL - TAKOMA PARK | |
| KINGS CHRISTIAN ACADEMY - CALLAWAY | |
| KRIEGER SCHECHTER DAY SCHOOL - BALTIMORE | |
| LAMB OF GOD SCHOOL - BALTIMORE | |
| LANHAM CHRISTIAN SCHOOL - LANHAM | |

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| LEO BERNSTEIN JEWISH ACADEMY OF FINE ARTS - SILVER SPRING | |
| LEONARD HALL JUNIOR NAVAL ACADEMY INC - LEONARDTOWN | |
| LIGHTHOUSE CHRISTIAN ACADEMY - CUMBERLAND | |
| LITTLE FLOWER SCHOOL - BETHESDA | |
| LITTLE FLOWER SCHOOL - GREAT MILLS | |
| LUCY SCHOOL - MIDDLETOWN | |
| MARY OF NAZARETH ROMAN CATHOLIC SCHOOL - DARNSTOWN | |
| MARYLAND INTERNATIONAL DAY SCHOOL - FT. WASHINGTON | |
| MARYVALE PREPARATORY SCHOOL - LUTHERVILLE | |
| MELVIN J BERMAN HEBREW ACADEMY - ROCKVILLE | |
| MERCY HIGH SCHOOL - BALTIMORE | |
| MESIVTA NE'IMUS HATORAH - BALTIMORE | |
| MONSIGNOR SLADE REGIONAL CATHOLIC SCHOOL - GLEN BURNIE | |
| MONTESSORI MANOR - PHOENIX | |
| MONTESSORI SCHOOL OF WESTMINSTER - WESTMINSTER | |
| MOST BLESSED SACRAMENT CATHOLIC SCHOOL - OCEAN PINES | |
| MOTHER CATHERINE ACADEMY - HELEN | |
| MOTHER OF GOD SCHOOL - GAITHERSBURG | |
| MOTHER SETON ACADEMY - BALTIMORE | |
| MOTHER SETON SCHOOL - EMMITSBURG | |
| MOUNT AVIAT ACADEMY - CHILDS | |
| MOUNT DE SALES ACADEMY - CATONSVILLE | |
| MOUNT PLEASANT CHRISTIAN SCHOOL | |
| MT. AETNA ADVENTIST SCHOOL - HAGERSTOWN | |
| MT. ST. JOSEPH HIGH SCHOOL - BALTIMORE | |
| NATIONAL CHRISTIAN ACADEMY - FT. WASINGTON | |

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| NEW CHAPEL CHRISTIAN ACADEMY - CAMP SPRINGS | |
| NEW HOPE ACADEMY - LANDOVER HILLS | |
| NEW SPIRITUAL FOUNDATION CHRISTIAN ACADEMY - BALTIMORE | |
| NORTH CARROLL COMMUNITY SCHOOL - WESTMINSTER | |
| NOTRE DAME PREPARATORY SCHOOL - TOWSON | |
| OHR CHADASH ACADEMY - BALTIMORE | |
| OLNEY ADVENTIST PREPARATORY SCHOOL - OLNEY | |
| OUR LADY OF GOOD COUNSEL HIGH SCHOOL - OLNEY | |
| OUR LADY OF HOPE ST LUKE SCHOOL - BALTIMORE | |
| OUR LADY OF LOURDES SCHOOL - BETHESDA | |
| OUR LADY OF MERCY SCHOOL - POTOMAC | |
| OUR LADY OF MT. CARMEL SCHOOL - BALTIMORE | |
| OUR LADY OF PERPETUAL HELP SCHOOL - ELLICOTT CITY | |
| OUR LADY OF VICTORY SCHOOL - BALTIMORE | |
| OUR LADY STAR OF THE SEA SCHOOL - SOLOMONS | |
| PERRY HALL CHRISTIAN SCHOOL - PERRY HALL | |
| PILGRIM CHRISTIAN DAY SCHOOL - BALTIMORE | |
| PROGRESSIVE EDUCATION CENTER DAY SCHOOL - BALTIMORE | |
| REID TEMPLE CHRISTIAN ACADEMY - GLENN DALE | |
| RESURRECTION ST PAUL SCHOOL - ELLICOTT CITY | |
| SACRED HEART SCHOOL - GLYNDON | |
| SAINT MARY'S RYKEN - LEONARDTOWN | |
| SAINTS PETER AND PAUL HIGH SCHOOL - EASTON | |
| SALISBURY CHRISTIAN SCHOOL - SALISBURY | |
| SCHOOL OF THE CATHEDRAL OF MARY OUR QUEEN - BALTIMORE | |
| SCHOOL OF THE INCARNATION - GAMBRILLS | |

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| SENECA ACADEMY - DARNESTOWN | |
| SHABACH CHRISTIAN ACADEMY - LANDOVER | |
| SISTERS ACADEMY OF BALTIMORE - BALTIMORE | |
| SLIGO ADVENTIST SCHOOL - TAKOMA PARK | |
| SOUTHERN MARYLAND CHRISTIAN ACADEMY - WHITE PLAINS | |
| SPENCERVILLE ADVENTIST ACADEMY - SPENCERVILLE | |
| ST PETER AND PAUL ELEMENTARY SCHOOL - EASTON | |
| ST. AGNES SCHOOL - BALTIMORE | |
| ST. AMBROSE SCHOOL - CHEVERLY | |
| ST. ANDREW APOSTLE SCHOOL - SILVER SPRING | |
| ST. ANDREWS UNITED METHODIST DAY SCHOOL - EDGEWATER | |
| ST. AUGUSTINE SCHOOL - ELKRIDGE | |
| ST. BARTHOLOMEW SCHOOL - BETHESDA | |
| ST. BERNADETTE SCHOOL - SILVER SPRING | |
| ST. CASIMIR CATHOLIC SCHOOL - BALTIMORE | |
| ST. COLUMBA SCHOOL - OXON HILL | |
| ST. ELIZABETHS SCHOOL - ROCKVILLE | |
| ST. FRANCES ACADEMY - BALTIMORE | |
| ST. FRANCIS DE SALES SCHOOL - SALISBURY | |
| ST. FRANCIS INTERNATIONAL SCHOOL - SILVER SPRING | |
| ST. FRANCIS OF ASSISI SCHOOL - BALTIMORE | |
| ST. IGNATIUS LOYOLA ACADEMY - BALTIMORE | |
| ST. JAMES AND ST JOHN CAMPUS OF QUEEN OF PEACE SCHOOL - BALTIMORE | |
| ST. JANE DE CHANTAL SCHOOL - BETHESDA | |
| ST. JANE FRANCES SCHOOL - PASADENA | |
| ST. JEROMES ACADEMY - HYATTSVILLE | |

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| ST. JOAN OF ARC SCHOOL - ABERDEEN | |
| ST. JOHN CATHOLIC SCHOOL - WESTMINSTER | |
| ST. JOHN REGIONAL CATHOLIC SCHOOL - FREDERICK | |
| ST. JOHN THE BAPTIST SCHOOL - SILVER SPRING | |
| ST. JOHN THE EVANGELIST CATHOLIC SCHOOL - HYDES | |
| ST. JOHN THE EVANGELIST SCHOOL - SILVER SPRING | |
| ST. JOHN THE EVANGELIST SCHOOL - SEVERNA PARK | |
| ST. JOHN THE EVANGELIST SCHOOL - CLINTON | |
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| ST. JOHNS SCHOOL - HOLLYWOOD | |
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| ST. MARYS CATHOLIC SCHOOL - LANDOVER HILLS | |
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| ST. MARYS HIGH SCHOOL - ANNAPOLIS | |
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| ST. PHILIP NERI SCHOOL - LINTHICUM | |
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| STEPPING STONES LEARNING ACADEMY - FRUITLAND | |
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| THE AVALON SCHOOL - GAITHERSBURG | |
| THE SALISBURY SCHOOL - SALISBURY | |
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| TIDEWATER SCHOOL - HUNTINGTOWN | |
| TOME SCHOOL - NORTH EAST | |
| TORAH INSTITUTE OF BALTIMORE - OWINGS MILLS | |
| TORAH SCHOOL OF GREATER WASHINGTON - SILVER SPRING | |
| TRINITY LUTHERAN SCHOOL - JOPPA | |
| TRINITY SCHOOL - ELLICOTT CITY | |
| TRUTH CHRISTIAN ACADEMY - HAGERSTOWN | |
| UNSELDS SCHOOL - BALTIMORE | |
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| WASHINGTON CHRISTIAN ACADEMY - OLNEY | |
| WASHINGTON UNITED CHRISTIAN ACADEMY - HYATTSVILLE | |
| WICOMICO DAY SCHOOL - SALISBURY | |
| WOODSTREAM CHRISTIAN ACADEMY - MITCHELLVILLE | |
| YESHIVA OF GREATER WASHINGTON - SILVER SPRING | |
| YESIVAS TORAS SIMCHA | |

Attachment B



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www.mdpta.org

October 11, 2017

Advisory Board Meeting, BOOST Program
Maryland State Department of Education
200 West Baltimore Street
Baltimore, MD 21201

Dear Advisory Board,

Thank you for allowing the Maryland PTA provide public comments before the Board that oversees the Program on Broadening Options and Options for Students Today; in other words, BOOST. While many of you are familiar with the Parent Teacher Association (PTA), we want reiterate that we are the largest child advocacy organization in the United States. The Maryland Congress of PTAs promote the PTA's mission to make every child's potential a reality by engaging and empowering families and communities to advocate for all children.

We are pleased to see that the Biblical Lifestyle Requirement of the 2017-18 school year Parent Handbook of Trinity Lutheran Christian School (TLCS) is on the agenda for discussion on acceptance of either of the school's proposal to modify such language to comport with the eligibility requirements of the BOOST Program. Maryland PTA appreciates your being proactive to diligently approach the school for them to amend their handbook and hopefully, practice.

The Maryland PTA has had a long-standing position of endorsing the use of public funds exclusively for public schools. Any consideration for funding the student tuition of private schools with tax payer dollars via legislative appropriations must be met with the strongest application to hold schools accountable to the laws, policies and regulations pertaining to such administration of funds.

It is important to hold schools not only accountable to eligibility requirements but also making schools transparent. Hence, given TLCS's previous two years of being an awardee of BOOST funds while maintaining an open discrimination policy disguised as a Biblical Lifestyle Requirement to refuse admission of an applicant or to discontinue enrollment of a student based on the sexual orientation of a child's parents, it is warranted to say that a stronger partnership is needed between education advocacy organizations such as the Maryland PTA and MSDE to assist in holding schools accountable. It is doubtful that MSDE would have known of such policy if it weren't for any outside organization.

Thus, the Maryland PTA recommends that for all schools that have accepted BOOST funding since inception of the program during the 2016-17 school year as well as for those seeking eligibility henceforth, that following be required of all participating schools:

- All school related parent or student handbooks or annual correspondence to parents that reflect the policies, guidelines and expectations of the students be provided online for public accountability and access.
- All schools establish a clear anti-discrimination policy consistent with the eligibility requirements of BOOST as well as the Nonpublic Schools Textbook Program.
- Appropriation of any BOOST funding should be contingent upon the establishment of the above aforementioned recommendations:
 - to make parent/student handbook communications available online and
 - to establish and publish publicly an online anti-discrimination policy in its admissions and enrollment process

With specific regard to Trinity Lutheran Christian School their initial proposal to modify their Oct. 4 re-write of their policy to *“Reserve the right within the school’s sole discretion to refuse admission of an applicant or to discontinue enrollment of a student, when on those occasions, in which the atmosphere or conduct inside or outside the school is counter to or in opposition to the biblical standards the school teaches.”* is completely unacceptable as it does nothing to ameliorate not penalizing children based on their parents’ or family’s actions, behaviors or lifestyles.

Furthermore, the school’s Oct. 6 concession to completely withdraw the “Present Lifestyle Document” doesn’t mean that there is no adherence to silently implement a policy that has been established for years. Withdrawing the text from the Parent Handbook doesn’t mean that it still won’t be in practice. Hence, the omission of the text along with an established public anti-discrimination policy is better suited to make the school accountable to the eligibility requirements of the BOOST Program.

In terms of administration of the program by MSDE, Maryland PTA respectfully requests that an annual public calendar be established as soon as possible along with the minutes of meetings published within a designated time. Moreover, the agenda should be made public at least a week or more prior to the scheduled board meeting so that interested parties can provide feedback in a timely fashion. Maryland PTA also requests that the MSDE website be updated to reflect a specific person to contact in name, number and email regarding the oversight or administration of the BOOST Program.

During the 102nd Maryland PTA Convention July 28-29, our Congress was informed that the next public meeting was on Aug. 7 and when a call was made to confirm a few days before the meeting it was stated that the meeting was cancelled and when inquired about when the next meeting would occur the lady who answered the phone could not find out when. Maryland PTA has since learned that there was a meeting Aug. 11 and then on Sept. 1. There is a concerned that the public notice was insufficient for interested stakeholders to provide comment or witness the meeting. Lastly, please add Maryland PTA as a partner with which to communicate and send materials such as the agenda or other pertinent meeting information that will be provided at the Advisory Board meetings. Materials may be submitted to the current Maryland PTA President, Latisha Corey at president@mdpta.org. Thank you so much for your time.

Follow-up Comments that were requested after public statement.

As an addendum to the public comments, the Maryland PTA would like to provide additional remarks as a follow-up to the question asked of Maryland PTA’s opinion about the Advisory Board’s decision to disqualify Trinity Lutheran Christian School from participating in the BOOST Program. Part of the disqualification from not adhering to the assurances required by the BOOST Program and guaranteed by a school official, the Advisory Board is considering whether the school ought to pay back the funds granted last school year which is supported

via regulatory language along with not forcing the parents to pay the differential of the tuition promised to them by the state and foregone by the school.

Because Maryland PTA supports the well-being of all students and teachers as well as understands the budgetary nature of private schools and how potential teacher layoffs or increase in tuition could result from any implementation of a claw back clause that requires repayment of the tuition funds from a disqualified institution, the Maryland PTA would rather have a disqualified school penalized in a non-retroactive method. Preference would be to implement a future-oriented penalty and a continued ineligibility status for the same number of years the school was non-compliant. We also believe that, in this instance, allowing parents to have their children matriculate without the economic hardship of having responsibility to pay the gap in tuition expenses are fair as authorized via the budget bill of the 2016 legislative session.

Sincerely,

Maryland PTA

Exhibit 2

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EDUCATION

Maryland banned a school from voucher program over anti-LGBT views. It says that violates religious freedom.

By LIZ BOWIE
BALTIMORE SUN | JUL 15, 2019





Bethel Christian Academy filed a federal lawsuit against Maryland that put the small school in the center of a national fight over religious freedoms and gender rights. (Jerry Jackson / Baltimore Sun)

A private Christian Academy whose conservative values don't accept same-sex marriage or transgender people says Maryland unfairly threw it out of a school voucher program because of its religious beliefs.

Administrators of the multimillion-dollar scholarship program counter that the state can't allow taxpayer money to go to any institution – religious or otherwise – that discriminates against students because of their sexual orientation.

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Now, a federal court has been asked to decide who is right in a case with broad implications for the voucher system, anti-discrimination laws, and the battle between those championing religious liberties and others hoping to strengthen the rights of LGBTQ students.

The Bethel Christian Academy in Savage filed suit in federal court last month saying the state is infringing on its First Amendment right to religious freedom by kicking it out of a program that pays tuition for low-income children to attend the school. It wants a judge to order the state to put it back into the program.

“The Supreme Court has been very clear that there is no place in our society for religious hostility,” said Christiana Holcomb, the school’s legal counsel. “That is the crux of the issue of this case.” She said the state pushed Bethel out of the voucher program based “solely on the fact that Bethel has a particular religious belief around marriage.”

The school is represented by the Alliance Defending Freedom, a legal organization that has been actively fighting gay rights. Their attorneys brought the case of a Colorado baker who refused to make a cake for a gay couple all the way to the U.S. Supreme Court, winning a narrow victory.

The issues addressed in the Bethel lawsuit are being contested nationwide, and depending on the ruling, could reach far beyond Maryland, experts said.

“The Supreme Court has been very clear that

there is no place in our society for religious hostility.”

— CHRISTINA HOLCOMB, ATTORNEY FOR BETHEL CHRISTIAN

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“Right now there is a great deal of debate across the country about government funding to organizations that have a conservative religious position on LGBT issues,” said Charles Haynes, vice president of the nonpartisan Freedom Forum Institute.

The debate, he said, extends beyond schools to social services and adoption agencies. So far there are no clear legal answers to the questions that have been raised over religious freedom versus civil rights.

"I think people are going to pay attention to this case if it goes to court," said Charles Russo, a law professor at the University of Dayton.

Maryland's education leaders decided to deny vouchers to Bethel Christian Academy in 2018 after it read the school's handbook, which says that it believes marriage can only be between a man and a woman and that God assigns a gender to a child at birth.

“Therefore, faculty, staff and student conduct is expected to align with this view,” the handbook states. “Faculty, staff and students are required to identify with, dress in accordance with, and use the facilities associated with their biological gender.”

State officials would not comment on the case.

Documents included in Bethel's lawsuit, however, show that in August 2018, Matthew Gallagher, chair of an advisory board that oversees the vouchers, wrote

the school saying the state viewed the policy as discriminatory.

“A non-heterosexual student may reasonably view the policy as one that allows

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its face, was in conflict with the nondiscrimination clause contained in the ... law.”

David Rocah, an attorney with the ACLU of Maryland, sees the case as part of nationwide attempt to undercut laws against discrimination based on sex, and potentially important to discrimination law in the country.

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“I think it is part of a larger attempt by the religious right in this country to create a license to discriminate on the basis of religion,” Rocah said. He said the lawsuit, if successful, “threatens to undermine the entire fabric of anti-discrimination law in this country with profound consequences.”

Maryland’s voucher program, **begun in the 2016-2017 school** year under Republican Gov. Larry Hogan, offers students a taxpayer-funded scholarship to attend a private school. Called Broadening Options and Opportunities for Students, or BOOST, the program’s \$7 million budget is enough to support more than 3,000 students. The scholarships go to low-income students who want to attend a school where the tuition is less than \$14,000.

After the first year of the program, the BOOST board learned that a Harford County religious school had what it called discriminatory language in its handbook

and banned the use of vouchers there. It also launched a complete review of the handbooks of all 176 participating schools. The board said 22 schools had questionable language in their guides. Nine of those schools were ruled ineligible. Another 10 schools were disqualified and required to refund payments they had already received from the state. Of those 10 schools, six revised the language in their handbook and were approved to participate.

Some Christian academies said they would not accept students who were homosexual and would expel them if they exhibited “homosexual conduct.” The schools say they believe marriage can only be between a man and a woman.

After it rescinded Bethel’s approval, the BOOST board told Bethel to pay back the \$106,000 in state funds it had received. In the lawsuit, Bethel asks the court to both reinstate the school in the voucher program and not require it to pay back the money.

The voucher program was controversial from the start. Opponents — including teachers unions, local public school superintendents and school boards — argue that public money shouldn’t go to support private school tuition.

A Bethel win in the courts likely would not be a victory for most of the schools that accept vouchers.

Del. Maggie McIntosh, a Baltimore Democrat and chair of the House Appropriations Committee, said the legislature has been very clear that schools cannot have discriminatory policies and get tax money.

“If they were to win and it opened up the door to discrimination, I think you would find a strong movement in the legislature to end BOOST. We are just not going to use tax dollars to discriminate against anyone,” she said.

Catholic schools, which are not involved in the suit, have benefited from BOOST.

“We’re not privy to the decisions made by this school in moving forward with this lawsuit. Our Catholic schools have and will continue to support the BOOST Program and have been committed to complying with the BOOST Program

nondiscrimination requirements,” said Garrett J. O’Day, deputy director of the Maryland Catholic Conference. “To take the Program away would hurt thousands of low-income and minority students and in doing so threaten the stability of these community anchors.”

Holcomb, the Alliance Defending Freedom attorney, said concern that the program would be eliminated is “silly.”

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She said Bethel has an open admissions policy that will accept anyone who meets the school’s academic standards. In addition, she said all students are treated equally in being disciplined for sexual behavior. Students are prohibited from having any sexual contact, and even holding hands is forbidden.

She said the state “cannot point to any evidence of discrimination.”

Bethel principal **Claire Dant** said the pre-kindergarten through grade 8 school doesn’t ask a student’s sexual orientation during the admission process. Dant said the school is diverse with students from different economic and racial backgrounds. She said she doesn’t know if the school has had any gay students.

“None that have been so visible that it has been an issue or that we were aware of them,” she said.”

She said if a student were gay "it is invisible."

Experts on First Amendment and education law said they do not believe the case is

clear, largely because there is inherent conflict between the state saying a school does not have to adopt any policy that goes against its religious beliefs on the one

hand, and the state's determination that the school's religious beliefs are discriminatory on the other hand.

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Russo said the state's case would be stronger if it had an example of a student who had been discriminated against. Haynes said if schools can prove they don't discriminate in their admissions process, he is not sure the government can go any further. "I don't see where the state of Maryland sees its responsibility to investigate what these Christian schools believe and are teaching. The teaching of the school should be no business of the state."



Liz Bowie has been an education reporter for The Baltimore Sun for more than 20 years, covering every aspect of education. Since joining The Sun in 1986, she has also covered

environment, business and state government. A Baltimore native, she was a Spencer Fellow in Education Reporting at Columbia University.

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