

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

BETHEL MINISTRIES, INC.,

\*

*Plaintiff,*

\*

v.

\*

No. 1:19-cv-01853-SAG

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

\*

*Defendants.*

\*

\* \* \* \* \*

**LOCAL RULE 104.7 AND 104.8 CERTIFICATE OF COUNSEL  
REGARDING MOTION TO COMPEL**

Pursuant to Local Rule 104.7 and 104.8, I hereby certify, as counsel for defendants, that, as set forth below, I have conferred multiple times with counsel for plaintiff in attempt to resolve the issues raised in defendants' Motion to Compel filed herewith, including most recently on August 7, 2020:

1. Upon receipt of plaintiff's responses to defendants' interrogatories on April 6, 2020, my office sent a letter to counsel for plaintiffs on April 10, 2020, pointing out deficiencies in plaintiff's discovery responses.

2. On April 20, 2020, plaintiffs' counsel responded by letter and provided some additional information. However, plaintiff declined to provide information about the identities of students who allegedly were unable to attend school at Bethel due to the loss of BOOST funding, and the identities of students who Bethel declined to admit to its

school. Plaintiff objected to providing this information on the ground that it was confidential and irrelevant.

3. On April 22, 2020 at 1 p.m., counsel conferred by telephone to discuss plaintiff's objections. This conference included Robert A. Scott and Sarah Rice for defendants, and Paul Schmitt and Ryan Tucker, counsel for plaintiff. During this conference, counsel for defendants offered to enter into a confidentiality order to protect the identities of students from disclosure outside the litigation.

4. After this conference, on May 22, 2020, counsel for plaintiff made a supplemental document production, but still declined to provide information about the identities of unsuccessful applicants to the school or students who allegedly were unable to attend school at Bethel due to the loss of BOOST funding.

5. On June 3, 2020, my office sent another letter to counsel for plaintiff, again seeking the information about the identities of unsuccessful applicants and students who could not attend due to the loss of BOOST funding.

6. On June 16, 2020 at 11:30 a.m., counsel conferred by telephone to discuss plaintiff's objections. This conference included Robert A. Scott and Sarah Rice for defendants, and Paul Schmitt and Ryan Tucker, counsel for plaintiff. During this conference, counsel for defendants again offered to enter into a confidentiality order to protect the identities of students.

7. On June 20, 2020, plaintiff provided supplemental responses to defendants' discovery, and a privilege log, but still did not provide the information that defendants requested about student identities.

8. On July 2, 2020, defendants served the Motion to Compel attached hereto as Exhibit 1.

9. Only July 20, 2020, plaintiff served its response, attached hereto as Exhibit 2.

10. On August 3, 2020, defendants served their reply, which is attached as Exhibit 3.

11. On August 7, 2020 at 11 a.m., counsel conferred again by telephone to discuss plaintiff's objections to producing information about student identities. This call included Robert A. Scott and Justin Fine for defendants, and Paul Schmitt and Ryan Tucker, counsel for plaintiff. During this conference, counsel were unable to resolve the issues raised in the Motion to Compel.

12. Defendants seek an order requiring plaintiff to fully respond to defendants' interrogatories nos. 2, 14 and 15 and to defendants' requests for production of documents nos. 1 and 2.

Respectfully submitted,

BRIAN E. FROSH  
Attorney General of Maryland

*/s/ Robert A. Scott*

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August 10, 2020

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I certify that, on this 10<sup>th</sup> day of August, 2020 the foregoing Certificate of Counsel was filed by ECF and thereby served on all counsel of record.

*/s/ Robert A. Scott*

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

BETHEL MINISTRIES, INC., \*  
*Plaintiff,* \*

v. \*

No. 1:19-cv-01853-SAG

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

\* \* \* \* \*

**DEFENDANTS’ MOTION TO COMPEL  
PLAINTIFF TO RESPOND TO DISCOVERY**

Defendants, State Superintendent Dr. Karen B. Salmon, along with Broadening Options and Opportunities for Students Today (“BOOST”) Board Chair Matthew Gallagher and BOOST Board members Marva Jo Camp, Linda Eberhart, Dr. Nancy S. Grasmick, Elizabeth Green, Beth Sandbower Harbinson, and Dr. A. Skipp Sanders (collectively “the BOOST Board”), through their undersigned counsel, move pursuant to Rules 26, 33, 34 and 37 of the Federal Rules of Civil Procedure and Local Rule 104.8, to compel plaintiff to fully respond to certain of defendants’ discovery requests.

**BACKGROUND**

Plaintiff, Bethel Ministries, Inc. (“Bethel”) is a self-identified Christian ministry that operates a private school in Savage, Maryland. Complaint (ECF 1), ¶¶ 1-2. In 2016, Bethel began receiving scholarship funding for some of its students through BOOST, a program funded by the State of Maryland and administered by the Maryland Department of

Education. Complaint, ¶¶ 61-64. The BOOST program requires that participating schools not discriminate against students in admissions based on sexual orientation. Complaint, ¶ 7.

In 2018, Bethel was disqualified from receiving additional BOOST funding after the BOOST Board became aware that Bethel's admissions policy stated that students could be expelled from the school unless they "align" their "conduct" with Bethel's view that marriage is "a covenant between one man and one woman," and further mandated that students must "identify with, dress in accordance with, and use the facilities associated with their biological gender." Complaint, ¶¶ 48-56; ¶ 121; ¶ 134. On June 24, 2019, Bethel filed this action against defendants, asserting various constitutional claims based on the BOOST Board's decision to disqualify Bethel from receiving BOOST funding.

To defend against Bethel's claims, defendants propounded interrogatories and document requests to Bethel in March, 2020. The information sought by these requests relates directly to the allegations in the complaint, including the identities of prospective students who were denied admission, the identities of prospective students who expressed interest in attending the school but decided not to enroll, and the identities of those students that Bethel claims were unable to attend school at Bethel due to the loss of BOOST funding. Bethel has refused to provide this information. As set forth below, this information is relevant and should be produced.

## ARGUMENT

### **I. BETHEL SHOULD BE COMPELLED TO IDENTIFY STUDENTS WHO COULD NOT ATTEND BETHEL DUE TO THE LOSS OF BOOST FUNDING.**

Bethel alleges in its complaint that “at least six Bethel students were forced to leave Bethel due to lack of BOOST funding.” Complaint, ¶ 145. Bethel also asserts that “at least two prospective students desired to attend Bethel but could not do so” because Bethel was disqualified from receiving BOOST funding. Complaint, ¶ 146.

On March 6, 2020, defendants served interrogatories on Bethel, seeking the identities of the students who Bethel claims left school due to the loss of BOOST funding, as well as those prospective students who allegedly wanted to attend but could not due to the loss of BOOST funding. Even though this information relates directly to the allegations in its complaint, Bethel objected on burden and privacy grounds and refused to provide the identities of students who were unable to attend school at Bethel due to the loss of BOOST funding. Bethel’s initial responses and objections to interrogatories 2, 14 and 15 are attached hereto as Exhibit 1.

Upon receipt of Bethel’s original objections and responses, counsel for defendants wrote to counsel for Bethel and offered to enter into a confidentiality order to address Bethel’s concerns over student privacy. Exhibit 2. The parties engaged in additional written and verbal communications to attempt to resolve the dispute. On May 22, 2020, Bethel served first amended responses to interrogatories 2, 14 and 15, but still refused to provide the identities of the students who were allegedly unable to attend Bethel due to the

loss of BOOST funding. Counsel engaged in further correspondence and discussions to attempt to resolve this issue. Exhibit 3.

On June 20, 2020, Bethel served second amended interrogatory responses, in which Bethel still refused to identify students who were unable to attend the school due to the loss of BOOST funding:

**INTERROGATORY NO. 2:** Identify all people who have expressed interest in attending Bethel Christian Academy who ultimately did not enroll during the Relevant Time Period.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks private and confidential information, including the identities of minor children. Such information is protected by federal law. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, *et seq.* Bethel further objects to this interrogatory because it violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of individuals expressing interest to Bethel. Lastly, Bethel objects on the grounds that this interrogatory is vague, overly broad, not proportional to the needs of the case, and unduly burdensome. Families often decline to send their students to Bethel for reasons wholly unrelated to issues in this case. For example, families may “express interest” in Bethel merely by submitting an online form, but they may never follow up with Bethel staff or the student may achieve an insufficient score on Bethel’s entrance exam. In light of Bethel’s objections, Bethel withholds a document listing minor children and their families who indicated interest in Bethel Christian Academy but who ultimately did not enroll, as identified on Plaintiff’s Privilege Log.

**INTERROGATORY NO. 14:** Identify the six students referenced in paragraph 145 of the complaint.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks confidential information, including the identities of minor children, whose records and personal information are protected by federal law. *See* FERPA, 22 U.S.C. § 1232g, *et seq.* In addition, this interrogatory violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of former or current students.

**INTERROGATORY NO. 15:** Identify the two students referenced in paragraph [146] of the complaint.<sup>1</sup>

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks confidential information, including the identities of minor children, whose records and personal information are protected by federal law. *See* FERPA, 22 U.S.C. § 1232g, *et seq.* In addition, this interrogatory violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of former or current students.

Plaintiff's Second Amended Answers to Interrogatories Nos. 2, 14 and 15, attached hereto as Exhibit 4.

Bethel's assertion that it is entitled to withhold the identities of students and prospective students due to privacy concerns is without merit. Defendants have offered to make production of the students' identities subject to a confidentiality order protecting the information from disclosure. Exhibit 2. This is sufficient to protect the students' privacy. Bethel's reliance on FERPA is misplaced. The statute's regulations permit disclosure of student information "to comply with a judicial order or lawfully issued subpoena," provided that reasonable steps are taken to notify the students. 34 CFR 99.31(a)(9)(i). FERPA is not a bar to the discovery sought here.

Bethel's First Amendment associational rights also do not entitle it to withhold discoverable information. The Fourth Circuit has not adopted a First Amendment privilege in the discovery context. *See N. Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 53 (4th Cir. 1981). Further, Bethel has not offered any explanation

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<sup>1</sup> Interrogatory no. 15 originally incorrectly referred to paragraph 142 of the complaint instead of paragraph 146. This was corrected by defendants on June 3, 2020. Exhibit 3.

of how discovery of the students' identities subject to a confidentiality order would chill the First Amendment rights of Bethel and its members. Moreover, Bethel put the identity of these students at the core of the case by alleging that students were forced to leave school, or were unable to attend school, due to the defendants' actions. Defendants are therefore entitled to know who these students are to test the veracity of Bethel's assertions.

Finally, Bethel's objection that interrogatory no. 2 is overly broad and unduly burdensome is groundless in light of Bethel's own statement that it has in its possession a document listing minor children and their families who indicated interest in Bethel Christian Academy but who ultimately did not enroll, but is withholding that document. Exhibit 4. The Court should order Bethel to produce the list of students, and provide all other information sought by interrogatories 2, 14 and 15.

**II. BETHEL SHOULD BE COMPELLED TO IDENTIFY STUDENTS WHO IT DID NOT ADMIT.**

Bethel also should be compelled to produce documents showing the identities of students that it declined to admit to its school during the relevant time period. In its complaint, plaintiff alleges that it does not deny admission to its school based on the sexual orientation of the applicant. Complaint, ¶ 47. Indeed, this allegation was one of the primary reasons that the Court denied defendants' motion to dismiss. ECF 20 at 8. ("Defendants have not identified any student that Bethel has discriminated against in admissions on the basis of sexual orientation.").

But when defendants sought documents related to Bethel's decisions to refuse admission to prospective students, Bethel initially objected on relevancy, burdensomeness, privacy and other grounds, and refused to produce any documents. Exhibit 5. After further discussions among counsel, Bethel amended its responses as follows:

**REQUEST FOR PRODUCTION 1:** All documents concerning any decision by Bethel Christian Academy to not admit a student.

**RESPONSE:** Bethel objects to this request on the grounds that it is vague, overly broad, unduly burdensome, and may violate the First Amendment associational rights of Plaintiff and those seeking admission. Bethel may decide not to offer admission to prospective students for any number of reasons, including many reasons that are unrelated or irrelevant to the claims in this case. For example, some prospective students fail to meet Bethel's academic standards. Additionally, documentation that would be responsive to this request likely would include confidential information protected by federal law, specifically the identities of minor children. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, *et seq.* Subject to those objections, Bethel directs Defendants to Plaintiff Production 0443-0468, which reflect records of all applicants that Bethel declined to admit. The names have been redacted from Plaintiff Production 0443-0448, as reflected on Plaintiff's Privilege Log. Other than the documents previously produced and information contained on Plaintiff's Privilege Log, Plaintiff has not identified any other additional documents.

**REQUEST FOR PRODUCTION 2:** All documents concerning the reasons a student was not admitted to Bethel Christian Academy.

**RESPONSE:** Bethel objects to this request on the grounds that it is vague, overly broad, unduly burdensome, and may violate the First Amendment associational rights of Plaintiff and those seeking admission. Bethel may decide not to offer admission to prospective students for any number of reasons, including many reasons that are unrelated or irrelevant to the claims in this case. For example, some prospective students fail to meet Bethel's academic standards. Additionally, documentation that would be responsive to this request likely would include confidential information, specifically the identities of minor children, that is protected by federal law. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, *et seq.*

Subject to those objections, Bethel has produced documents responsive to this request. Bethel directs Defendants to Plaintiff Production 0443-0468, which reflect records of all applicants that Bethel declined to admit. The names have been redacted from Plaintiff Production 0443-0468, as reflected in Plaintiff's Privilege Log. In 19 of those 26 instances, applicants failed to pass Bethel's academic entrance exam. In the remaining seven instances, the applicant never completed the admissions process and Bethel accordingly never admitted them. Other than the documents previously produced and information contained on Plaintiff's Privilege Log, Plaintiff has not identified any other additional documents.

Bethel's Second Amended Responses to Request for Production of Documents Nos. 1 and 2, attached as Exhibit 6.

Along with these amended responses, Bethel produced admissions records (with applicants' names redacted) reflecting the rejection of approximately 25 unsuccessful applicants. Although these redacted documents appear to indicate that most of these applicants were denied admission due to low test scores, the documents provide no explicit reason for the rejection of several other applicants. And because Bethel has refused to identify by name any of the students who were refused admission, defendants have no way of determining whether these applications were rejected for discriminatory reasons other than to take Bethel's word for it.

Bethel's refusal to produce the names of the unsuccessful applicants—particularly those for whom the reason for their rejection is not stated in the records—is not consistent with Rule 26's mandate that a party is entitled to discovery of any matter that is "relevant to any party's claim or defense and proportional to the needs of the case." Here, this Court has stated that the identity of the unsuccessful applicants is highly relevant to Bethel's

claim that it does not discriminate in its admissions process. Although defendants continue to assert that factual development is not necessary on this issue as a matter of law because of the facially discriminatory nature of the admissions policy, defendants certainly are entitled to discover the identities of these students so they can test the accuracy of Bethel's claims that it did not deny admission for discriminatory reasons.

Moreover, even if Bethel has not actively rejected applicants based on sexual orientation, it is certainly possible that applicants may have opted to abandon their applications upon learning that they could be expelled unless their conduct conformed to a heterosexual idea of marriage or to the "identity" attendant with their biological sex. The language of Bethel's admissions policy itself eliminates the need for Bethel to take any additional actively discriminatory steps. Because the admissions policy states that students who do not conform their conduct with a heterosexual idea of marriage or to the "identity" attendant with their biological sex will be subject to expulsion, those students are deterred from attending. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (incidental to the prohibition on discrimination on the basis of race in employment, employer may also be required "to take down a sign reading 'White Applicants Only . . . .'").

Defendants are entitled to know if Bethel's policies contributed to the decision of any prospective students to abandon their applications. Even if proof of actual discrimination is not necessary to defeat Bethel's claim because of the discriminatory policy at issue here, any such evidence would nevertheless be relevant under the *Arlington*

*Heights* framework for evaluating discriminatory intent. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977) (determining discriminatory intent requires “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”) But without knowing the students’ names, defendants have no way to contact the unsuccessful applicants to determine why they did not complete their applications and whether Bethel’s admissions policies were the reason.

### **CONCLUSION**

WHEREFORE, for the reasons stated herein, defendants respectfully request that the Court enter an order requiring that plaintiff produce all information and documents responsive to defendants’ interrogatories nos. 2, 14 and 15 and requests for production of documents nos. 1 and 2 within 10 days and order such other and further relief as may be appropriate.

Respectfully submitted,

BRIAN E. FROSH  
Attorney General of Maryland

*/s/ Sarah W. Rice*

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July 2, 2020

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I certify that, on this 2nd day of July, 2020 the foregoing Motion to Compel was served by email and first-class mail, postage pre-paid on:

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*/s/ Robert A. Scott* \_\_\_\_\_

# Exhibit 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

BETHEL MINISTRIES, INC., )

*Plaintiff,* )

DR. KAREN B. SALMON, et al. )

*Defendants.* )

Case No. 2:19-cv-15

**PLAINTIFF’S ANSWERS TO DEFENDANTS’  
FIRST SET OF INTERROGATORIES**

Plaintiff Bethel Christian Ministries, by and through its attorneys and pursuant to Federal Rule of Civil Procedure 33, responds to Defendants’ First Set of Interrogatories dated March 6, 2020.

Preliminary Statement

Bethel advises that its discovery, investigation, and preparation for trial in this matter are incomplete as of this date. Therefore, Bethel will respond to these Interrogatories to the best of its current knowledge. However, Bethel anticipates that the discovery process will reveal facts, documents, and witnesses presently unknown to Bethel. Bethel may supplement these answers as new information surfaces. Accordingly, these answers are not intended to preclude Bethel from making any contention or relying on any facts, documents, or witnesses at trial, whether or not identified or relied upon here.

**ANSWERS TO INTERROGATORIES**

**INTERROGATORY NO. 1:** Identify all persons who are likely to have personal knowledge of any fact alleged in the pleadings, and state the subject matter of the personal knowledge possessed by each such person. (Standard Interrogatory No. 1)

**ANSWER:** Principal Claire Dant and Dr. Johnny Green are persons with personal knowledge of the events that occurred leading up to and during Bethel's expulsion from BOOST. Principal Dant has primary knowledge of Bethel's expulsion from BOOST and the surrounding circumstances. Defendants Dr. Karen B. Salmon, Matthew Gallagher, Marva Jo Camp, Linda Eberhart, Dr. Nancy S. Grasmick, Elizabeth Green, Beth Sandbower Harbinson, and Dr. A. Skipp Sanders likewise have knowledge of the facts contained in Bethel's Complaint.

**INTERROGATORY NO. 2:** Identify all people who have expressed interest in attending Bethel Christian Academy who ultimately did not enroll during the Relevant Time Period.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks private and confidential information, including the identities of minor children. Such information is protected by federal law. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, *et seq.* Bethel further objects to this interrogatory on the grounds that it is vague, overly broad, not proportional to the needs of the case, unduly

**burdensome and violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of individuals expressing interest to Bethel.**

**INTERROGATORY NO. 3:** Identify all students who have been disciplined by Bethel Christian Academy during the Relevant Time Period, including all students who have been expelled.

**ANSWER:** Bethel objects to this interrogatory to the extent that it violates the right of privacy expected and enjoyed by non-parties and seeks confidential information protected by federal law, including the identities of minor children. *See FERPA, 22 U.S.C. § 1232g, et seq.* Bethel further objects to this interrogatory on the grounds that it is vague, overly broad, not proportional to the needs of the case, and unduly burdensome. In addition, this interrogatory violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of former and current students.

**INTERROGATORY NO. 4:** State whether, and if the answer is yes under what circumstances, you would deny admissions to or expel a student who expressed characteristics (including use of pronouns, dress, grooming, bathroom usage, or sex-stereotypical speech or behavior) of a gender other than the student's gender as assigned at birth.

hardships that were a direct consequence of Defendants expelling Bethel from the BOOST program, the school is not in a financial place to pay the clawback funds demanded by the State. Bethel never budgeted to return \$102,600 in funds used to educate Bethel students in 2016-17 and 2017-18. Attempting to find such a significant sum now would exacerbate the financial strains caused by Defendants' actions that Bethel faces.

**INTERROGATORY NO. 14:** Identify the six students referenced in paragraph 145 of the complaint.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks confidential information, including the identities of minor children, whose records and personal information are protected by federal law. *See FERPA, 22 U.S.C. § 1232g, et seq.* In addition, this interrogatory violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of former or current students.

**INTERROGATORY NO. 15:** Identify the two students referenced in paragraph 142 of the complaint.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks confidential information, including the identities of minor children, whose records and personal information are protected by federal law. *See FERPA, 22 U.S.C. § 1232g, et seq.* In addition, this interrogatory violates the First

Amendment associational rights of Plaintiff and the associational rights and right to privacy of former and current students.

**INTERROGATORY NO. 16:** Describe by category and location all documents, electronically stored information and tangible things that you may use to support your claims in this case.

**ANSWER:** Bethel objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, and asks it to marshal all of its evidence. Subject to those objections, Bethel will rely on documents provided by Defendants, including its correspondence with Defendants. Bethel also directs Defendants to Bethel's Motion for Preliminary Injunction, the video recording of a BOOST Board meeting, documents produced by Defendants, and publicly available documents at the BOOST and MSDE websites or that are within Defendants' custody, possession, or control.

**INTERROGATORY NO. 17:** If you contend that any defendant has made any admission and/or declaration against interest relating to any claims or defenses involved in this lawsuit, identify the person making each such admission or declaration, the substance of each such admission or declaration, the date of each

Dated this 6th day of April, 2020.

Respectfully submitted,

*/s/ Paul Schmitt*

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*Counsel for Plaintiffs*

*\*Admitted Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2020, the foregoing was served in compliance with the Federal Rules of Civil Procedure to the following:

Sarah W. Rice  
Assistant Attorney General  
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*/s/ Paul Schmitt*

---

Paul Daniel Schmitt  
*Attorney for Plaintiffs*

**VERIFICATION**

I, Claire Dant, a citizen of the United States and a resident of the State of Maryland, acting on behalf of Bethel Ministries, Inc. in my capacity as Principal of Bethel Christian Academy, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing Answers to Defendants' First Set of Interrogatories and that the statements contained therein are true and correct.

Dated this 6th day of April, 2020, at Lanham, Maryland.



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Claire Dant  
Bethel Christian Academy

# Exhibit 2



CAROLYN QUATTROCKI  
Deputy Attorney General

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CIVIL LITIGATION DIVISION

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April 10, 2020

**VIA ELECTRONIC-MAIL**

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Re: Bethel Ministries, Inc. v. Dr. Karen B. Salmon, et al.  
U.S. District Court for the District of MD, Case No. 1:19-cv-01853-SAG

Counsel,

Thank you for the document responses and responses to interrogatories dated April 3, 2020. We disagree with your objections. Please consider this letter a good-faith attempt to resolve a potential discovery dispute.

**INTERROGATORIES:**

**Nos. 2, 3, 14 and 15:** In response to interrogatories nos. 2 and 3, Bethel has objected and refused to provide any information concerning the identities of (1) prospective students who expressed interest but did not enroll in Bethel; or (2) students who were disciplined and/or expelled. This information goes to the heart of Bethel's claims in this case. Bethel's complaint asserts that "Bethel has not, and will not, deny an applicant admission to Bethel based on the sexual orientation of the applicant." Information about students who were denied admission or disciplined is therefore relevant to whether Bethel's admissions

April 10, 2020

Page 2 of 4

conduct was consistent with its statements, including under the BOOST Advisory Board's interpretation that expulsion could result in the constructive denial of admission to a student based on sexual orientation. Indeed, the district court made clear that discovery should provide information about "whether, and to what extent, language in Bethel's handbook was illustrative of its admissions conduct." ECF 41, 24.

In response to interrogatories nos. 14 and 15, Bethel has objected and refused to provide any information concerning students who were forced to leave school due to the loss of BOOST funding or applicants who were unable to enroll due to the loss of BOOST funding. This information is relevant to Bethel's allegations of harm in paragraphs 145 and 146 of the complaint.

Confidentiality of student identity and data is a shared concern between the parties. Defendants are willing to stipulate to a confidentiality order that would limit use of any personally identifiable data to this litigation and to protect that information from public inspection. We propose an order consistent with the example contained in Appendix D of the Local Rules. The entry of such an order should obviate any potential concerns under FERPA, to the extent FERPA applies to any particular discovery request.

Moreover, a confidentiality order should similarly mitigate concerns about potential impacts to associational rights under the First Amendment. If you disagree, please explain how associational rights might be chilled even if a confidentiality order is in place. As an ancillary matter, it is not apparent that Bethel Christian Academy is a membership organization, and, even if it were treated as one, you appear to have asserted First Amendment privilege with respect to non-members.

**No. 16:** Bethel has interposed an improper boilerplate objection to a standard interrogatory that requests the same information that parties are required to provide in initial disclosures under Rule 26(a)(1)(A)(ii), namely a description of documents that the plaintiff may use to support its claims. Please identify with specificity what "correspondence" and "publicly available documents" Bethel is referring to in its response. Also, please advise if you are withholding any information pursuant to your objections.

#### **REQUESTS FOR PRODUCTION OF DOCUMENTS:**

**Nos. 1, 2, 3 and 4:** Bethel has objected to producing any documents related to its decisions to not admit students or to discipline students. As explained above, this information is highly relevant to Bethel's claims, including but not limited to its assertion that Bethel has not denied admission based on the sexual orientation of applicants. Defendants are willing to make the production of this information subject to a confidentiality order. Please advise if this is acceptable. In addition, please identify with specificity all documents that Bethel is withholding pursuant to its objections to requests for production nos. 1, 2, 3 and 4, as required by Rule 34(b)(2)(C).

April 10, 2020

Page 3 of 4

**No. 5:** Bethel has objected to a request for documents related to its communications with the State and/or BOOST. Defendants are willing to limit the scope of this request to documents relating to communications concerning the matters in the complaint and/or the BOOST program. Please produce all such documents. In addition, please identify all documents, if any, that Bethel is withholding pursuant to its objections to this request.

**No. 6:** Bethel has objected, on First Amendment grounds, to producing documents it provided to members of the public inquiring into admissions to Bethel. The objection is unfounded. Please identify all documents, if any, that Bethel is withholding pursuant to its objections to this request.

**No. 7:** Bethel has objected to producing documents related to its admissions policies. This information is highly relevant. It is not clear from Bethel's response if it is withholding any responsive documents. Please identify all documents, if any, that Bethel is withholding pursuant to its objections to this request, as required by Rule 34(b)(2)(C).

**Nos. 8, 9, 11, 12, 13, 14, 15, 16:** Bethel has made improper boilerplate objections to all of these requests, several of which are form requests authorized by the discovery guidelines in the local rules, and all of which seek relevant information. It is not clear from Bethel's responses if it is withholding any documents responsive to these requests. Please identify all documents, if any, that Bethel is withholding pursuant to its objections to this request, as required by Rule 34(b)(2)(C).

**ATTORNEY-CLIENT PRIVILEGE:**

Bethel has asserted attorney-client privilege in response to several of the defendants' discovery requests. However, Bethel has not provided a privilege log of withheld documents. Please provide a privilege log as soon as possible.

We appreciate your prompt attention to this matter and respectfully request that you provide the information requested herein within 10 days.

We also note that today the United States District Court for the District of Maryland issued an Order in Misc. No. 20-146, explaining that conduct of civil discovery, while not automatically suspended, may be suspended by mutual assent. Available at <https://www.mdd.uscourts.gov/sites/mdd/files/COVID-19-Order13-Discovery.pdf>. Because we are at the beginning of document discovery, which may require searches of physical premises not currently accessible, we propose to suspend the conduct of discovery in this case, including the matters raised in this letter. Please let us know if you agree to this proposal.

April 10, 2020

Page 4 of 4

Yours truly,

s/\_\_\_\_\_  
Sarah W. Rice  
Assistant Attorney General

s/\_\_\_\_\_  
Robert A. Scott  
Assistant Attorney General

SWR/RAS/rus

# Exhibit 3



CAROLYN QUATTROCKI  
Deputy Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL  
CIVIL LITIGATION DIVISION

FACSIMILE NO.  
410-576-6997

WRITER'S DIRECT DIAL NO.  
410-576-7847

June 3, 2020

**VIA ELECTRONIC-MAIL**

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Alliance Defending Freedom

Re: Bethel Ministries, Inc. v. Dr. Karen B. Salmon, et al.  
U.S. District Court for the District of MD, Case No. 1:19-cv-01853-SAG

Counsel,

Thank you for the supplemental discovery responses dated May 22, 2020. While we have come closer to resolution on some issues, there are still items that require further response. Please consider this letter a good-faith attempt to resolve a potential discovery dispute.

**INTERROGATORIES:**

**No. 2:** In response to interrogatory number 2, Bethel has refused to provide any information concerning the identities of prospective students who expressed interest but did not enroll in Bethel. Notably, the response to this interrogatory did not state whether the redacted documents produced along with the supplemental

responses are the only potential source of this information, or whether Bethel has other responsive information within its possession or control. If Bethel has no further information responsive to this interrogatory, please provide a supplemental response to this effect. As we have previously expressed to you, this information is relevant to the issues the district court identified, including “whether, and to what extent, language in Bethel’s handbook was illustrative of its admissions conduct.” ECF 41, 24.

**No. 14:** In response to interrogatory no. 14, Bethel has refused to provide the identities of the six students who Bethel claims were forced to leave school due to the loss of BOOST funding, as alleged in paragraph 145 of the complaint. The identity of these students is directly relevant to Bethel’s allegations of harm.<sup>1</sup>

While we appreciate the redacted records that have been produced, they are insufficient to provide the information defendants need to test the veracity of plaintiff’s claims. We have offered to enter into a confidentiality order to protect personal identifying information, and remain willing to do so. The entry of such an order should obviate any potential concerns under FERPA, to the extent FERPA applies. And, as discussed previously, a confidentiality should similarly mitigate any First Amendment concerns, to the extent Bethel can assert any associational interest in the records.

### **REQUESTS FOR PRODUCTION OF DOCUMENTS:**

**Nos. 1 and 2:** Defendants appreciate the production of documents responsive to these two requests. However, the redaction of student identities remains unacceptable. In particular, defendants are entitled to the identities of students who were not admitted to Bethel for reasons other than failing the admissions test, including those students who abandoned their applications. The reasons these prospective students decided not to proceed with their applications is relevant to “whether, and to what extent, language in Bethel’s handbook was illustrative of its admissions conduct.” ECF 41, 24. In addition, please identify with specificity any documents that Bethel is withholding pursuant to its objections to requests for production nos. 1 and 2, as required by Rule 34(b)(2)(C).

**No. 3:** Bethel has not specified whether it has withheld documents responsive to this request beyond the single document produced. If Bethel does not have

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<sup>1</sup> It appears that there was a typographical error in Interrogatory No. 15, which should have referenced paragraph 146 of the complaint, but incorrectly referenced paragraph 142. We will issue a corrected interrogatory.

additional documents responsive to this request in its possession, custody or control, please provide a supplemental response to this effect. Otherwise, please identify with specificity all documents that Bethel is withholding.

As indicated in our correspondence dated April 10, 2020, it is unclear from Bethel's responses if it is withholding any documents responsive to any other document requests. Please identify all documents, if any, that Bethel is withholding pursuant to its objections.

As also indicated in our April 10 correspondence, Bethel has asserted attorney-client privilege in response to at least one of the defendants' discovery requests but has not provided a privilege log of withheld documents. Please provide a privilege log.

We request that Bethel provide supplemental responses including all the information requested herein by June 12, 2020. We would be happy to schedule a teleconference to further discuss these matters if you believe that would be helpful. We would prefer to resolve these issues without the need to seek intervention from the Court.

Yours truly,

s/\_\_\_\_\_  
Sarah W. Rice  
Assistant Attorney General

Cc: Robert A. Scott, AAG

**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.* \*

\* \* \* \* \*

**DEFENDANTS’ CORRECTED FIRST SET OF INTERROGATORIES  
TO PLAINTIFF**

Under Rule 33 of the Federal Rules of Civil Procedure, the Defendants propound this First Set of Interrogatories to all plaintiffs. You are required to respond to each interrogatory in writing and under oath, within 30 days, in accordance with the Federal Rules of Civil Procedure and the Instructions and Definitions set forth below.

**DEFINITIONS**

1. Except where specific terms are otherwise defined below, Defendants incorporate by reference the Uniform Definitions for Use in Discovery Requests contained in Appendix D of the Local Rules of the District of Maryland.

2. “Complaint” means any complaint you have filed in this matter or any complaint you file in this matter in the future.

3. “Including” means “including, but not limited to.”

4. “You” and “your” include the person to whom these interrogatories are addressed, and all of that person’s agents, representatives, and attorneys.

### **INSTRUCTIONS**

1. Defendants incorporate by reference the Uniform Instructions for Use in Discovery Requests contained in Appendix D of the Local Rules of Maryland.

2. Except where otherwise indicated, each Interrogatory covers the time period January 1, 2015 to August 8, 2018 (the “Relevant Time Period”).

### **INTERROGATORIES**

#### **INTERROGATORY NO. 1:**

Identify all persons who are likely to have personal knowledge of any fact alleged in the pleadings, and state the subject matter of the personal knowledge possessed by each such person. (Standard Interrogatory No. 1)

#### **INTERROGATORY NO. 2:**

Identify all people who have expressed interest in attending Bethel Christian Academy who ultimately did not enroll during the Relevant Time Period.

#### **INTERROGATORY NO. 3:**

Identify all students who have been disciplined by Bethel Christian Academy during the Relevant Time Period, including all students who have been expelled.

#### **INTERROGATORY NO. 4:**

State whether, and if the answer is yes under what circumstances, you would deny admissions to or expel a student who expressed characteristics (including use of pronouns,

dress, grooming, bathroom usage, or sex-stereotypical speech or behavior) of a gender other than the student's gender as assigned at birth.

**INTERROGATORY NO. 5:**

State all facts supporting paragraph 47 of the complaint, including a full description of how Bethel Christian Academy determined that it has not denied an applicant admission to Bethel based on the sexual orientation of the applicant.

**INTERROGATORY NO. 6:**

State all facts and identify all documents supporting paragraph 53 of the complaint, including all facts supporting the statement that Bethel Christian Academy's conduct policy prohibits any communication of a sexual nature.

**INTERROGATORY NO. 7:**

State all facts and identify all documents supporting paragraph 52 of the complaint, including all facts supporting the statement that Bethel Christian Academy's conduct policy prohibits "physical contact or public affection."

**INTERROGATORY NO. 8:**

State all facts supporting your contention in paragraph 92 of the complaint that "MSDE began investigating the policy language of BOOST schools in the fall of 2017."

**INTERROGATORY NO. 12:**

State all facts supporting your contention in paragraph 93 of the complaint that "this action was not prompted by any allegation of discrimination in student admissions that would violate the BOOST nondiscrimination requirement."

**INTERROGATORY NO. 13:**

State all facts and provide all calculations supporting your contention in paragraph 142 of the complaint that “Bethel would be in serious financial constraints if forced to pay \$102,600 to MSDE.”

**INTERROGATORY NO. 14:**

Identify the six students referenced in paragraph 145 of the complaint.

**INTERROGATORY NO. 15:**

Identify the two students referenced in paragraph 146 of the complaint.

**INTERROGATORY NO. 16:**

Describe by category and location all documents, electronically stored information and tangible things that you may use to support your claims in this case.

**INTERROGATORY NO. 17:**

If you contend that any defendant has made any admission and/or declaration against interest relating to any claims or defenses involved in this lawsuit, identify the person making each such admission or declaration, the substance of each such admission or declaration, the date of each such admission or declaration and identify all documents relating to each such admission or declaration.

**INTERROGATORY NO. 18:**

Identify and describe all communications you had with anyone, other than your attorneys, concerning any of the matters described in the Complaint, including in your

answer the parties to each communication, the subject matter of each communication and the date and time of each communication.

**INTERROGATORY NO. 19:**

Identify every person you expect to call as a witness in this action, and for each individual state with specificity the subject matter of their testimony.

BRIAN E. FROSH  
Attorney General of Maryland

/s/ Sarah W. Rice

---

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June 3, 2020

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I certify that on June 3, 2020, a copy of the foregoing Corrected First Set of Interrogatories was sent via email and first-class mail, postage prepaid to the following:

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/s/ Sarah W. Rice

Sarah W. Rice

# Exhibit 4

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

BETHEL MINISTRIES, INC., )

*Plaintiff,* )

DR. KAREN B. SALMON, et al. )

*Defendants.* )

Case No. 2:19-cv-15

**PLAINTIFF’S SECOND AMENDED ANSWERS TO DEFENDANTS’  
FIRST SET OF INTERROGATORIES**

Plaintiff Bethel Christian Ministries, by and through its attorneys and pursuant to Federal Rule of Civil Procedure 33, responds to Defendants’ First Set of Interrogatories dated March 6, 2020.

Preliminary Statement

Bethel advises that its discovery, investigation, and preparation for trial in this matter are incomplete as of this date. Therefore, Bethel will respond to these Interrogatories to the best of its current knowledge. However, Bethel anticipates that the discovery process will reveal facts, documents, and witnesses presently unknown to Bethel. Bethel may supplement these answers as new information surfaces. Accordingly, these answers are not intended to preclude Bethel from making any contention or relying on any facts, documents, or witnesses at trial, whether or not identified or relied upon here.

**ANSWERS TO INTERROGATORIES**

**INTERROGATORY NO. 1:** Identify all persons who are likely to have personal knowledge of any fact alleged in the pleadings, and state the subject matter of the personal knowledge possessed by each such person. (Standard Interrogatory No. 1)

**ANSWER:** Principal Claire Dant and Dr. Johnny Green are persons with personal knowledge of the events that occurred leading up to and during Bethel's expulsion from BOOST. Principal Dant has primary knowledge of Bethel's expulsion from BOOST and the surrounding circumstances. Defendants Dr. Karen B. Salmon, Matthew Gallagher, Marva Jo Camp, Linda Eberhart, Dr. Nancy S. Grasmick, Elizabeth Green, Beth Sandbower Harbinson, and Dr. A. Skipp Sanders likewise have knowledge of the facts contained in Bethel's Complaint.

**INTERROGATORY NO. 2:** Identify all people who have expressed interest in attending Bethel Christian Academy who ultimately did not enroll during the Relevant Time Period.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks private and confidential information, including the identities of minor children. Such information is protected by federal law. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, *et seq.* Bethel further objects to this interrogatory because it violates the First Amendment associational rights of Plaintiff and the associational rights

and right to privacy of individuals expressing interest to Bethel. Lastly, Bethel objects on the grounds that this interrogatory is vague, overly broad, not proportional to the needs of the case, and unduly burdensome. Families often decline to send their students to Bethel for reasons wholly unrelated to issues in this case. For example, families may “express interest” in Bethel merely by submitting an online form, but they may never follow up with Bethel staff or the student may achieve an insufficient score on Bethel’s entrance exam. In light of Bethel’s objections, Bethel withholds a document listing minor children and their families who indicated interest in Bethel Christian Academy but who ultimately did not enroll, as identified on Plaintiff’s Privilege Log.

**INTERROGATORY NO. 3:** Identify all students who have been disciplined by Bethel Christian Academy during the Relevant Time Period where a potential consequence of the discipline imposed was expulsion or where the disciplined student left the school within 60 days of the imposition of discipline.

**ANSWER:** Bethel objects to this interrogatory to the extent that it violates the right of privacy expected and enjoyed by non-parties and seeks confidential information protected by federal law, including the identities of minor children. *See FERPA, 22 U.S.C. § 1232g, et seq.* In addition, this interrogatory violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of former and current students. Subject to these objections, Bethel responded to this

**ANSWER:** Bethel has suffered significant drops in enrollment, from 329 in the 2017-18 school year to 251 in the present school year. Bethel has suffered a commensurate loss of tuition revenue. Additionally, Bethel no longer received other state aid money, such as funds from the Textbook and Technology and Aging Schools programs. To cover the lost revenues, the school has been forced to forego hiring teachings and backfilling positions and updating equipment. In view of these significant financial hardships that were a direct consequence of Defendants expelling Bethel from the BOOST program, the school is not in a financial place to pay the clawback funds demanded by the State. Bethel never budgeted to return \$102,600 in funds used to educate Bethel students in 2016-17 and 2017-18. Attempting to find such a significant sum now would exacerbate the financial strains caused by Defendants' actions.

**INTERROGATORY NO. 14:** Identify the six students referenced in paragraph 145 of the complaint.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks confidential information, including the identities of minor children, whose records and personal information are protected by federal law. See FERPA, 22 U.S.C. § 1232g, *et seq.* In addition, this interrogatory violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of former or current students.

**INTERROGATORY NO. 15:** Identify the two students referenced in paragraph 142 of the complaint.

**ANSWER:** Bethel objects to this interrogatory to the extent that it seeks confidential information, including the identities of minor children, whose records and personal information are protected by federal law. See FERPA, 22 U.S.C. § 1232g, *et seq.* In addition, this interrogatory violates the First Amendment associational rights of Plaintiff and the associational rights and right to privacy of former and current students.

**INTERROGATORY NO. 16:** Describe by category and location all documents, electronically stored information and tangible things that you may use to support your claims in this case.

**ANSWER:** Bethel will rely on documents provided by Defendants, including its correspondence with Defendants about Bethel's eligibility for the BOOST, Aging Schools, and Textbooks and Technology Programs. Bethel also directs Defendants to Bethel's Motion for Preliminary Injunction, the video recording of a BOOST Board meeting, documents produced by Defendants, and publicly available documents at the BOOST and MSDE websites or that are within Defendants' custody, possession, or control. Bethel continues to build its case as discovery progresses and has

Dated this 20th day of June, 2020.

Respectfully submitted,

*/s/ Paul Schmitt*

---

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*Counsel for Plaintiffs*

*\*Admitted Pro Hac Vice*

# Exhibit 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

BETHEL MINISTRIES, INC., )

)

*Plaintiff,* )

Case No. 2:19-cv-15

)

DR. KAREN B. SALMON, et al. )

)

*Defendants.* )

)

---

**PLAINTIFF’S RESPONSES TO DEFENDANTS’  
FIRST SET OF REQUESTS FOR PRODUCTION**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff by and through its undersigned counsel, hereby responds to Defendants’ Requests for Production as follows:

Preliminary Statement

Bethel advises that its discovery, investigation, and preparation for trial in this matter are incomplete as of this date. Therefore, Bethel will respond to these Requests for Production to the best of its current knowledge. However, Bethel anticipates that the discovery process will reveal facts, documents, and witnesses presently unknown to Bethel. Bethel may supplement these Responses as new information surfaces and seasonably produce responsive documents as they become known or available. Accordingly, these Responses are not intended to preclude Bethel from making any contention or relying on any facts, documents, or witnesses at trial, whether or not identified or relied upon here.

**RESPONSES TO REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION 1:**

All documents concerning any decision by Bethel Christian Academy to not admit a student.

**RESPONSE:**

**Bethel objects to this request on the grounds that it is vague, overly broad, unduly burdensome, and may violate the First Amendment associational rights of Plaintiff and those seeking admission. Bethel may decide not to offer admission to prospective students for any number of reasons, including many reasons that are unrelated or irrelevant to the claims in this case. For example, some prospective students fail to meet Bethel's academic standards. Additionally, documentation that would be responsive to this request likely would include confidential information protected by federal law, specifically the identities of minor children. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, *et seq.* Bethel may be able to provide documentation responsive to a request that is more specific and relevant in scope, less burdensome to produce, and that contains the appropriate safeguards and waivers.**

**REQUEST FOR PRODUCTION 2:**

All documents concerning the reasons a student was not admitted to Bethel Christian Academy.

**RESPONSE:**

**Bethel objects to this request on the grounds that it is vague, overly broad, unduly burdensome, and may violate the First Amendment associational rights of Plaintiff and those**

seeking admission. Bethel may decide not to offer admission to prospective students for any number of reasons, including many reasons that are unrelated or irrelevant to the claims in this case. For example, some prospective students fail to meet Bethel's academic standards. Additionally, documentation that would be responsive to this request likely would include confidential information, specifically the identities of minor children, that is protected by federal law. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, et seq. Bethel may be able to provide documentation responsive to a request that is more specific and relevant in scope, less burdensome to produce, and that contains the appropriate safeguards and waivers.

**REQUEST FOR PRODUCTION 3:**

All documents (including, but not limited to, correspondence, notes, memoranda, and journal entries) which relate to, describe, summarize, or memorialize any communication between you and any prospective parent or student concerning admission to Bethel Christian Academy.

**RESPONSE:**

Bethel objects to this request on the grounds that it is vague, overly broad, unduly burdensome, and may violate the First Amendment associational rights of Plaintiff and those seeking admission. Bethel may decide not to offer admission to prospective students for any number of reasons, including many reasons that are unrelated or irrelevant to the claims in this case. For example, some prospective students fail to meet Bethel's academic standards. Additionally, documentation that would be responsive to this request likely would include confidential information, specifically the identities of minor children, that is protected by federal law. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, et

Dated this 6th day of April, 2020.

Respectfully submitted,

*/s/ Paul Schmitt*

---

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*Counsel for Plaintiff*

*\*Admitted Pro Hac Vice*

# Exhibit 6

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

BETHEL MINISTRIES, INC., )

)

*Plaintiff,* )

Case No. 2:19-cv-15

)

DR. KAREN B. SALMON, et al. )

)

*Defendants.* )

)

---

**PLAINTIFF’S SECOND AMENDED RESPONSES TO DEFENDANTS’  
FIRST SET OF REQUESTS FOR PRODUCTION**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff by and through its undersigned counsel, hereby responds to Defendants’ Requests for Production as follows:

Preliminary Statement

Bethel advises that its discovery, investigation, and preparation for trial in this matter are incomplete as of this date. Therefore, Bethel will respond to these Requests for Production to the best of its current knowledge. However, Bethel anticipates that the discovery process will reveal facts, documents, and witnesses presently unknown to Bethel. Bethel may supplement these Responses as new information surfaces and seasonably produce responsive documents as they become known or available. Accordingly, these Responses are not intended to preclude Bethel from making any contention or relying on any facts, documents, or witnesses at trial, whether or not identified or relied upon here.

**RESPONSES TO REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION 1:**

All documents concerning any decision by Bethel Christian Academy to not admit a student.

**RESPONSE:**

Bethel objects to this request on the grounds that it is vague, overly broad, unduly burdensome, and may violate the First Amendment associational rights of Plaintiff and those seeking admission. Bethel may decide not to offer admission to prospective students for any number of reasons, including many reasons that are unrelated or irrelevant to the claims in this case. For example, some prospective students fail to meet Bethel's academic standards. Additionally, documentation that would be responsive to this request likely would include confidential information protected by federal law, specifically the identities of minor children. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, *et seq.* Subject to those objections, Bethel directs Defendants to Plaintiff Production 0443-0468, which reflect records of all applicants that Bethel declined to admit. The names have been redacted from Plaintiff Production 0443-0448, as reflected on Plaintiff's Privilege Log. Other than the documents previously produced and information contained on Plaintiff's Privilege Log, Plaintiff has not identified any other additional documents.

**REQUEST FOR PRODUCTION 2:**

All documents concerning the reasons a student was not admitted to Bethel Christian Academy.

**RESPONSE:**

**Bethel objects to this request on the grounds that it is vague, overly broad, unduly burdensome, and may violate the First Amendment associational rights of Plaintiff and those seeking admission. Bethel may decide not to offer admission to prospective students for any number of reasons, including many reasons that are unrelated or irrelevant to the claims in this case. For example, some prospective students fail to meet Bethel's academic standards. Additionally, documentation that would be responsive to this request likely would include confidential information, specifically the identities of minor children, that is protected by federal law. *See* Family Educational Rights and Privacy Act (FERPA), 22 U.S.C. § 1232g, et seq.**

**Subject to those objections, Bethel has produced documents responsive to this request. Bethel directs Defendants to Plaintiff Production 0443-0468, which reflect records of all applicants that Bethel declined to admit. The names have been redacted from Plaintiff Production 0443-0468, as reflected in Plaintiff's Privilege Log. In 19 of those 26 instances, applicants failed to pass Bethel's academic entrance exam. In the remaining seven instances, the applicant never completed the admissions process and Bethel accordingly never admitted them. Other than the documents previously produced and information contained on Plaintiff's Privilege Log, Plaintiff has not identified any other additional documents.**

**REQUEST FOR PRODUCTION 3:**

All documents (including, but not limited to, correspondence, notes, memoranda, and journal entries) which relate to, describe, summarize, or memorialize any communication between you and any prospective parent or student concerning admission to Bethel Christian Academy.

**RESPONSE:**

Dated this 20th day of June, 2020.

Respectfully submitted,

*/s/ Paul Schmitt*

---

John R. Garza  
MD Fed. Dist. Court # 01921  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION**

BETHEL MINISTRIES, INC., )  
)  
)  
*Plaintiff,* )  
)  
DR. KAREN B. SALMON, et al. )  
)  
)  
*Defendants.* )  
)

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Case No. 1:19-cv-01853-SAG

**PLAINTIFF’S RESPONSE IN OPPOSITION TO  
DEFENDANTS’ MOTION TO COMPEL**

**INTRODUCTION**

Defendants harmed Bethel Christian Academy when they labeled the school and its religious beliefs as discriminatory and expelled it from Maryland’s BOOST program. Defendants caused Bethel to lose students and access to other state aid and are threatening the school with a \$102,600 penalty. And they based their actions solely on the school’s handbook language that explained Bethel’s religious beliefs.

In response, Bethel brought this action because Defendants unjustly conflated Bethel’s deeply held religious beliefs with discriminatory behavior. In discovery, Bethel has produced numerous documents related to student admissions and discipline. None of those documents support Defendants’ accusations of discrimination because Bethel does not discriminate.

Now Defendants ask this Court to compel Bethel to reveal the identities of dozens of minor children who considered or applied to attend Bethel. Why? Because Defendants—all government officials—want to call families throughout Bethel’s community to see if they can possibly find an

aggrieved individual after the fact to substantiate their assumptions of discrimination. Defendants' request makes one thing clear: Defendants' decision to expel Bethel was based purely on the handbook language explaining Bethel's religious beliefs, not on any actual complaint or instance of discrimination.

This Court should reject Defendants' inappropriate and harmful request for a judicially sanctioned fishing expedition. Defendants' requested information is irrelevant to answering the claims here and is intended to harass and annoy Bethel and members of its community. And Defendants seek information protected by the First Amendment and federal law. Given that Defendants intend to use the information to contact people in Bethel's community, a protective order will not prevent further damage. The information they seek, if even deemed appropriate, can be gained from other sources.

### **BACKGROUND**

Bethel participated in Maryland's Broadening Options and Opportunities for Students Today (BOOST) program without incident for two years, providing financially vulnerable students with a loving and excellent educational environment. BOOST provides state-funded tuition to students from low-income families. The tuition vouchers belong to the students, who (with their families) decide where to attend school. The state statute that establishes the BOOST program includes a non-discrimination requirement. And during the years that Bethel participated in BOOST, the statute required BOOST schools to sign assurances confirming that they did not discriminate on the basis of sexual orientation in admissions. Bethel never discriminated against a student on the basis of sexual orientation and it never will because sexual orientation is not a criterion considered in admissions. Bethel consequently signed assurances for the two school years that it participated in the program.

Without a complaint of discrimination, Defendants collected participating schools' student handbooks to search for discriminatory policies. Bethel's student handbook transparently articulated the school's religious beliefs on many topics. It also articulated Bethel's religiously informed beliefs on the nature of marriage and biological sex. Defendants then asked for clarifications of Bethel's admissions policies and procedures and, in response, Bethel stated multiple times that the school does not discriminate in student admissions.

Ultimately, the Maryland State Department of Education (MSDE) and BOOST Board unjustly conflated Bethel's beliefs about marriage and biological sex with discriminatory conduct. Defendants kicked Bethel out of the BOOST program for two years (the 2018-19 and 2019-20 school years), kicked Bethel out of the Textbooks and Technology Program, and kicked Bethel out of the Aging Schools Program. Defendants informed Bethel that it could potentially participate in the BOOST program if it altered its handbook to remove the "problematic" language—the portions expressing Bethel's religious and moral beliefs about marriage and biological sex. But Bethel declined. Months after kicking Bethel out of BOOST, Defendants sent Bethel a letter demanding more than \$100,000 of the tuition funds Bethel received for the 2016-17 and 2017-18 school years—even though Bethel never discriminated against any student and the school had loved and served every student who learned there.

After months of unsuccessful attempts to resolve this dispute with Defendants, Bethel filed suit. *See* ECF 1. Defendants moved to dismiss this case, but this Court denied their motion. ECF 20. Bethel then moved for a preliminary injunction, but the Court declined to grant the relief. ECF 41. Defendants moved the Court to stay proceedings for more than a year until the U.S. Supreme Court resolves *Fulton v. City of Philadelphia*, but the Court declined to do so. ECF 53.

The parties then moved forward with discovery. Throughout the discovery process, Defendants made requests for production of documents and served interrogatories on Bethel. Bethel was forced to raise certain objections, pointing out that the scope of Defendants' requests reached far beyond what was relevant to the claims of this case and sometimes was privileged.

Nevertheless, Bethel responded to Defendants' interrogatories with sworn answers confirming that Bethel does not consider sexual orientation or gender identity in student admissions or discipline, and therefore does not discriminate. Bethel also produced hundreds of pages of documents related to student admissions and discipline. None of those documents support Defendants' accusations—again, because Bethel does not consider sexual orientation or gender identity in their admissions or student discipline processes.

In its document production, Bethel released disciplinary and application records with the personally identifying information (PII) redacted. Plaintiff Production 0368-0371, 0443-0468. Redacting PII protects student privacy rights guaranteed by federal law. *See* Family Educational Rights and Privacy Act (FERPA) 22 U.S.C. § 1232g, *et seq.* *See also United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (redacting PII satisfies FERPA privacy obligations). Because none of these children or their parents executed waivers of their privacy rights under federal law, Bethel considered it inappropriate to disclose their PII to Defendants.

But the redacted documents Bethel released do provide information about the reasons why prospective students never matriculated into Bethel's student body: the records show that prospective students either failed the admissions exam or never completed the application process. And Bethel's interrogatory answers provide context that explains the documents' content to Defendants. Yet Defendants remain unsatisfied and insist that they are entitled to PII of minor

children and their families, with the explicitly stated intention of contacting those students or their families to “test the accuracy” of Bethel’s assertion that it does not discriminate.

### **ARGUMENT**

Defendants ask this Court to compel Bethel to disclose the PII of minor children and their families, arguing that this information is necessary to their defense against Bethel’s claims. Bethel provided Defendants with evidence showing that students were not granted admission because they either failed the admissions exam or never completed the application process to begin with. Defendants’ motion should be denied because the information sought is not relevant or necessary to their defense, because the forced release of PII will inflict great harm on Bethel and its community, and because Defendants can obtain the information they seek from other sources.

#### **I. Student And Family Identities Are Irrelevant To The Claims In This Case.**

Defendants insist that the PII they request is necessary to answer Bethel’s claims. Not so. Defendants expelled the school from BOOST because they disagree with Bethel’s religious beliefs; Bethel’s claims center on *why the Defendants* expelled Bethel from BOOST. Therefore, the only evidence relevant to defending this claim will be *what the Defendants knew at the time they decided to expel Bethel: i.e.,* instances of alleged discrimination known to the MSDE or BOOST Board when they evaluated and determined Bethel’s BOOST fate.

If Defendants knew of allegations of discrimination against Bethel, that evidence is within their possession or control. But if instead they must randomly survey the community, seeking to find aggrieved individuals who might substantiate their assumptions and baseless accusations after the fact, then the information Defendants seek is beyond the claims of this case and can only serve as a harmful distraction from the issues involved.

Defendants' own arguments in their Motion to Compel show why revealing PII of minor children and their families is unnecessary: they claim the religious language in Bethel's student handbook is facially discriminatory. *See* Def. Mot. at 9 ("defendants continue to assert that factual development is not necessary on this issue as a matter of law because of the facially discriminatory nature of the admissions policy."). According to Defendants, whether Bethel's admissions statement is facially discriminatory is therefore a question for the Court.<sup>1</sup>

But Defendants also argue that they must also survey the community, sniffing around for evidence that would validate their prejudicial assumptions. They cite *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (circumstantial evidence relevant in rooting out government *defendant's* alleged invidious racial discrimination in housing). Again, Defendants miss the point: the inquiry relevant to this case's claims is *why Defendants* kicked Bethel out of BOOST—Defendants should know the answer to that question without calling on everyone in Bethel's community for help. Defendants either relied on evidence of discrimination when they made their decision, or they did not.

## **II. Disclosing Student Identities Will Severely Harm Bethel And Its Community.**

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<sup>1</sup> Defendants grossly misconstrue Bethel's Statement of Nondiscrimination listed after its Admissions Policy. Defendants state, for example, "the admissions policy states that students who do not conform their conduct with a heterosexual idea of marriage or to the 'identity' attendant with their biological sex will be subject to expulsion." *See* Def. Mot. at 9. This is wrong. *See* ECF 19-5 at 0008. Bethel's students are minor children for whom marriage is irrelevant. The statement in question says, "Bethel Christian Academy supports the biblical view of marriage defined as a covenant between one man and one woman," which the United States Supreme Court has recognized as a "decent and honorable religious . . . premis[e]." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). And beyond students, the statement addresses conduct expectations for faculty and staff. Such an unfair mischaracterization of Bethel's position cautions this Court against allowing Defendants access to the PII of Bethel's community members for the stated purpose of contacting them to substantiate phantasms of discrimination.

Defendants already inflicted harm on Bethel when they expelled it from BOOST. The school has suffered a significant loss in enrollment in the wake of Defendants' actions. ECF 19-3 at 7. Disclosing the PII of minor children and their families will further cause Bethel and others severe harm in multiple ways. Beyond irrelevance, Bethel refuses to release PII because the law protects that information. Granting Defendants' motion will subject Bethel and its community to harassment. It will exacerbate the stigmatic and reputational harm that Defendants have caused Bethel.

Defendants seek information protected by the First Amendment and federal law. Churches and their schools have First Amendment associational rights and forced disclosure of the identities of those who associate with Bethel implicates those rights. *See, e.g., Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 967 (5th Cir. 1993) (discovery requests seeking church membership or contributor information is "an obvious infringement of the First Amendment associational right"). And contrary to Defendants' characterization, the Fourth Circuit never rejected First Amendment privilege in *N. Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52 (4th Cir.1981). That case only analyzed whether *Noerr-Pennington* immunity—an anti-trust affirmative defense doctrine also used in business torts—could be applied more broadly to discovery. What's more, FERPA provides federal statutory protection to education records. 22 U.S.C. § 1232g. None of the statute's listed exceptions apply here because, as explained above, protected PII is unnecessary to resolving this case's issues. *See id.*

Because student and family PII is irrelevant to the claims in this case—as Defendants concede—its use will only harass, annoy, and embarrass Bethel and members of its community. "[A] party is not entitled to conduct discovery that is intended to harass, annoy, embarrass, or

oppress the opposing party.” *Jarvis v. Enter. Fleet Servs.*, No. CV DKC-07-3385, 2009 WL 10708892, at \*2 (D. Md. Feb. 17, 2009) *citing* Fed. R. Civ. P. 26(c).

Defendants argue that a protective order will ensure student privacy and mitigate any concerns about First Amendment rights. But Defendants intend to use the PII to engage in unsolicited, *ex parte* contact with numerous people with various affiliations with Bethel. FERPA and other student privacy laws intend to protect students and their families from potential harassment and abuse. Defendants make their request in a “cancel culture” atmosphere where the prevailing winds violently blow against those with unpopular beliefs, opinions, or affiliations.<sup>2</sup> Phone calls from government attorneys suggesting the existence of and soliciting details about alleged discrimination are especially vulnerable to abuse. A protective order will not suffice, given the way that Defendants have confirmed they will use the information they seek.

Worse still, such an inquisition will compound the stigmatic harm that Defendants have already inflicted on Bethel. ECF 19-3 at 7. Because of Defendants’ actions to date, Bethel has already suffered a significant loss in enrollment and financial harms. ECF 19-3 at 7. It takes no imagination to understand the severe additional reputational harm that Bethel will suffer in its community when government attorneys call families to ask whether they suffered any mistreatment from the allegedly discriminatory school with “very problematic” religious beliefs. Parents who never consented to Bethel’s release of their personal information will be less inclined to involve themselves with the school or church community after receiving unsolicited phone calls from government attorneys asking them about Bethel’s alleged misconduct. And these phone calls will come precisely at a time when private schools are navigating re-opening amid a global

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<sup>2</sup> See, e.g., William Jacobson, *Cancel Culture is Real*, Real Clear Politics, July 15, 2020, [https://www.realclearpolitics.com/articles/2020/07/15/cancel\\_culture\\_is\\_real.html](https://www.realclearpolitics.com/articles/2020/07/15/cancel_culture_is_real.html)

pandemic. The last thing Bethel needs is a platoon of government lawyers calling parents with accusations that Bethel did something wrong. A protective order does nothing to prevent or mitigate these harms.

### **III. Defendants Can Obtain The Information They Need Through Other Means.**

Defendants insist that this Court should force Bethel to reveal the PII of minor children and their families so that Defendants can “test the accuracy of Bethel’s assertions” and ready their defenses. But Defendants can obtain all the information they need to accomplish these goals without forcing Bethel to release legally protected PII.

First, Defendants claim that they need the PII to verify that kicking Bethel out of BOOST caused BOOST students to leave the school or go elsewhere. But this information is within Defendants’ possession or control. Defendants themselves track BOOST vouchers, know which students use those vouchers, and know where those students use their vouchers. Defendants do not need Bethel to reveal the identities of individual students to confirm the fact that students who used vouchers at Bethel used those vouchers elsewhere after Defendants expelled Bethel from BOOST. What’s more, that information only speaks to the fact that Bethel suffered damages. Defendants cannot negate the damages element of Bethel’s claims while they simultaneously pursue a \$102,600 penalty of previously paid BOOST funds.

Second, Defendants seek information about students who Bethel declined to admit. To begin with, Bethel produced all documents directly related to applications that did not result in admissions in Plaintiff Production 0443-0468. Those records show that the vast majority of students Bethel declined to admit failed the school’s entrance exam. They also show that the remaining students never completed the application process. As Bethel explained to Defendants in its interrogatory answers, Bethel never admitted the students because they never finished applying

for admission. None of the records indicate that students were denied admission to Bethel for any other reason. *See In re: Fluidmaster, Inc.*, 2016 WL 6599947, at \*10–11 (N.D. Ill. Nov. 8, 2016) (parties not entitled to additional discovery to test the veracity of sworn responses, without a cause to doubt responses).

And Defendants can “test the accuracy” of these records and interrogatory answers. Defendants may inquire into each application record under oath through depositions of the staff involved in Bethel’s admissions process. Defendants can also test the accuracy of Bethel’s sworn interrogatory answers in those depositions, and Defendants can inquire into details about specific records that they believe are relevant to the claims here. Defendants need not cold-call parents of children in the community to harass them by asking irrelevant personal questions about their experience with Bethel.

### **CONCLUSION**

This Court should deny Defendants’ motion to compel Bethel to disclose the PII of minor children and their families. Federal law protects this information and the implicated individuals never executed waivers consenting to the release of their information. And the information is irrelevant to the claims in this case—Defendants concede this point by alleging that Bethel’s policy is facially discriminatory. Its disclosure will only enable Defendants to engage in a harassing, annoying fishing expedition that will significantly harm Bethel and the members of its community. Defendants can obtain the information needed from other sources within their possession or control. Therefore, this Court should deny Defendants’ motion.

Dated this 20th day of July, 2020.

Respectfully submitted,

*/s/ John R. Garza*

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**CERTIFICATE OF SERVICE**

I certify that, on this 20th Day of July, 2020, the foregoing was served in compliance with the Federal Rules of Civil Procedure to the following:

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

BETHEL MINISTRIES, INC., \*  
*Plaintiff,* \*

v. \*

No. 1:19-cv-01853-SAG

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

\* \* \* \* \*

**DEFENDANTS’ REPLY  
IN FURTHER SUPPORT OF MOTION TO COMPEL**

Defendants, State Superintendent Dr. Karen B. Salmon, along with Broadening Options and Opportunities for Students Today (“BOOST”) Board Chair Matthew Gallagher and BOOST Board members Marva Jo Camp, Linda Eberhart, Dr. Nancy S. Grasmick, Elizabeth Green, Beth Sandbower Harbinson, and Dr. A. Skipp Sanders (collectively “the BOOST Board”), through their undersigned counsel, submit this Reply in further support of their Motion to Compel.

**ARGUMENT**

**I. THE IDENTITIES OF STUDENTS WHO COULD NOT ATTEND BETHEL DUE TO THE LOSS OF BOOST FUNDING ARE RELEVANT.**

Bethel argues that the identities of students who were unable to attend school at Bethel due to the loss of BOOST funding are “irrelevant” and that defendants’ request for this information is nothing but a “fishing expedition” designed to harass the families of minor children. Plaintiff’s Opposition (“Opposition”) at 2.

This is plainly wrong. Bethel's own Complaint alleges that "at least six Bethel students were forced to leave Bethel due to lack of BOOST funding." Complaint, ¶ 145. Bethel's complaint also alleges that "at least two prospective students desired to attend Bethel but could not do so" because Bethel was disqualified from receiving BOOST funding. Complaint, ¶ 146. Bethel goes even further in its Opposition, asserting that Bethel "has suffered a significant loss in enrollment in the wake of Defendants' actions." Opposition at 7.

Bethel has placed these students, and the reasons they did not attend school, squarely at the center of this dispute by alleging that students were forced to leave school, or were unable to attend school, due to the defendants' actions. Defendants are therefore entitled to know who these students are.

Bethel is incorrect that defendants are not entitled to discovery for the purpose testing the veracity of Bethel's allegations. Courts have made clear that testing the accuracy of a plaintiff's allegations is a fundamental purpose of the discovery process. *See National Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Scales*, 150 F. Supp. 2d 845, 852 (D. Md. 2001); *see also Decorator's Rug Warehouse, Inc. v. Zurich American Insurance Co.*, 2010 WL 11597514 at \*2 (C.D. Cal. June 2, 2010) (defendant entitled to discovery to test defendant's allegations); *Southern Illinois Laborers' and Employers Health and Welfare Fund v. Pfizer Inc.*, 2007 WL 4557100 at \*6 (N.D. Ill. Dec. 21, 2007) ("Pfizer has a right to discovery that will test the validity of Plaintiffs' allegations").

Bethel's reliance on *In re: Fluidmaster, Inc.*, 2016 WL 6599947 (N.D. Ill. Nov. 8, 2016) is misplaced. That case dealt with the question of whether the defendant was entitled to discover documents protected by the attorney-client privilege to test the veracity of plaintiffs' allegations. The information sought here is not claimed as privileged.

Bethel cannot have it both ways. It should not be permitted to allege and prove that it has lost enrollment and withhold the information defendants need to determine if its allegations are true.

## **II. THE IDENTITIES OF STUDENTS BETHEL DID NOT ADMIT ARE RELEVANT.**

Bethel is also wrong that documents showing the identities of students who it declined to admit to its school are not relevant. In its complaint, plaintiff alleges that it does not deny admission to students based on the sexual orientation of the applicant. Complaint, ¶ 47. This allegation was one of the reasons that the Court denied defendants' motion to dismiss. ECF 20 at 8. ("Defendants have not identified any student that Bethel has discriminated against in admissions on the basis of sexual orientation.").

Furthermore, in denying Bethel's motion for a preliminary injunction, the Court explicitly stated that Bethel's admissions conduct was an important topic for discovery. ECF 41 at 24 ("The discovery process should reveal facts about, *inter alia*, (1) whether, and to what extent, language in Bethel's handbook was illustrative of its admissions conduct").

Having made its alleged non-discriminatory conduct the centerpiece of its case, Bethel now seeks to conceal from defendants—and the Court—the information necessary

to assess whether the actual facts are consistent with Bethel's allegations. Again, one of the fundamental purposes of discovery is to permit a defendant to test the veracity of the plaintiff's allegations. *See National Coalition for Students with Disabilities*, 150 F. Supp. 2d at 852; *Decorator's Rug Warehouse, Inc.*, 2010 WL 11597514 at \*2; *Southern Illinois Laborers*, 2007 WL 4557100 at \*6.

Similarly unavailing is Bethel's assertion that the identities of unsuccessful applicants are irrelevant because defendants' decision to disqualify Bethel from the BOOST program was not based on any specific instance of discrimination but rather on Bethel's written handbook and policies. The Court has already stated that Bethel's admissions conduct is a relevant topic for discovery. ECF 41 at 24.

Moreover, defendants are entitled to know whether Bethel's policies contributed to the decision of any prospective students to abandon their applications. Although proof of actual discrimination may not be necessary in this case because of the facially discriminatory policy at issue, any such evidence would nevertheless be relevant. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977).<sup>1</sup> But without knowing the students' names,

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<sup>1</sup> Bethel's suggestion that *Village of Arlington Heights* only applies to evidence that a defendant engaged in purposeful discrimination is incorrect. Opposition at 6. Nothing in the language of the decision suggests that the Supreme Court intended to limit the principle that circumstantial evidence is relevant to showing discriminatory intent to a defendant's conduct.

defendants have no way to contact the unsuccessful applicants to determine why they did not complete their applications and whether Bethel's admissions policies were the reason.<sup>2</sup>

Bethel's refusal to produce the names of the unsuccessful applicants—particularly those for whom the reason for their rejection is not stated in the records that Bethel has produced—is not consistent with Rule 26.

**III. BETHEL'S PRIVACY CONCERNS CAN BE ADDRESSED BY A CONFIDENTIALITY ORDER.**

Bethel's privacy concerns are overblown and can be easily dealt with by entry of a confidentiality order. The mere fact that Bethel does not want defendants' counsel to contact the families of unsuccessful applicants does not take the information outside the scope of discovery. It is Bethel's own allegations that have made these former and prospective students important fact witnesses in this case.

Contrary to Bethel's assertions, FERPA does not make the identities of prospective students immune from discovery. As shown in defendants' motion, the statute's regulations permit disclosure of student information "to comply with a judicial order or lawfully issued subpoena," provided that reasonable steps are taken to notify the students. 34 CFR 99.31(a)(9)(i).

**IV. DEFENDANTS' DISCOVERY REQUESTS DO NOT VIOLATE BETHEL'S FIRST AMENDMENT RIGHTS.**

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<sup>2</sup> Bethel wrongly accuses defendants of misconstruing its admissions policy as making "subject to expulsion" students who do not conform their conduct with a heterosexual idea of marriage or to the identity attendant to their biological sex. Opposition at 6, n.1. Contrary to Bethel's assertions, the admissions policy explicitly states that "continued enrollment" at the school is dependent on support of the school's policies. ECF 1-4 at 8.

Bethel's First Amendment associational rights do not entitle it to withhold discoverable information. Defendants are not seeking a list of Bethel's members or financial contributors. Hence, *Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 967 (5th Cir. 1993) is inapposite. Further, defendants are not seeking the identities of members of Bethel, but rather the identities of unsuccessful applicants and students who no longer attend school at Bethel. Bethel has not offered any viable explanation of how discovery of these students' identities subject to a confidentiality order would chill the First Amendment rights of Bethel and its members. Moreover, Bethel put the identity of these students at the core of the case by alleging that students were forced to leave school, or were unable to attend school, due to the defendants' actions.

**V. ALL OF THE INFORMATION SOUGHT IS NOT OTHERWISE AVAILABLE.**

Bethel's assertion that defendants can obtain the student identities from other sources also fails. First, defendants have no way of knowing the identities of students who applied to Bethel but declined to finish their applications. Only Bethel and the students themselves have that information. Second, the fact that some students who left Bethel may have obtained BOOST funding to attend other schools does not mean that *all* such students did so. Some may have attended public schools, or schools that were not eligible for BOOST funding. Further, the fact that this information may be available to defendants from another source does not excuse Bethel from producing it. *See Mallavarapu v. Acadiana Cardiology, LLC*, 2012 WL 369896, at \*5 (W.D. La. 2012); *Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Sys., Inc.*, 2005 WL 1459555, at \*6 (N.D. Cal.

2005); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 513-14 (N.D. Iowa 2000); *Associated Wholesale Grocers, Inc. v. United States*, 1989 WL 110300, at \*3 (D. Kan. 1989); *City Consumer Servs., Inc. v. Horne*, 100 F.R.D. 740, 747 (D. Utah 1983).

**CONCLUSION**

WHEREFORE, for the reasons stated herein, defendants respectfully request that the Court enter an order requiring that plaintiff produce all information and documents responsive to defendants' interrogatories nos. 2, 14 and 15 and requests for production of documents nos. 1 and 2 within 10 days and order such other and further relief as may be appropriate.

Respectfully submitted,

BRIAN E. FROSH  
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*/s/ Robert A. Scott*

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August 3, 2020

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**CERTIFICATE OF SERVICE**

I certify that, on this 3rd day of August, 2020 the foregoing Reply In Further Support Of Motion to Compel was served by email and first-class mail, postage pre-paid on:

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