

BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

THIRUVENDRAN VIGNARAJAH
DEPUTY ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 7, 2015

The Honorable Brooke E. Lierman
Maryland General Assembly
311 House Office Building
Annapolis, Maryland 21401

Re: House Bill 70 – Budget Bill (Supplemental #2)

Dear Delegate Lierman:

You asked for advice about the Governor's Supplemental Budget #2. In particular, you asked several questions relating to Item 7 (R00A03.05), Student Assistance Organization Business Grants. Below I will briefly describe the item, then will list your questions and answer each.

Proposal for Student Assistance Organization Business Entity Grants

Supplemental Budget #2 contains an appropriation of \$5M to be used "for grants equal to no more than 50 percent of the certified amount a business entity contributes to a student assistance organization to provide financial assistance to students attending nonpublic schools that meet the eligibility requirements to participate in the" Maryland Nonpublic Textbook Program administered by the Maryland State Department of Education ("MSDE"). The Department of Business and Economic Development ("DBED") is directed to administer the program, including establishing requirements for a charitable organization to be designated as a student assistance organization ("SAO"), for contributions to be certified as eligible for the State grants, and for designating education expenses for which the SAO may provide to students at nonpublic schools. In addition, DBED is directed to establish reporting requirements for SAOs "to ensure compliance with the program's requirements."

The supplemental budget item further provides that the assistance must be given to students who attend a nonpublic school that meets the requirements stated in the Budget Bill item R00A03.04, "Aid to Nonpublic Schools." Those requirements are that the nonpublic school shall: (1) be approved or registered with MSDE, (2) not charge more tuition than the statewide average per public expenditure than the local education board and, (3) comply with Title VI of the Civil Rights Act of 1964, as amended. (House Bill 70 at 103).

A SAO must be a 501(c)(3) charitable organization that spends "a minimum amount but no less than 95% of grant eligible funds annually on financial assistance for qualified education expenses as provided in §530(b)(3)(a) of the Internal Revenue Code..." Those include:

- (i) expenses for tuition, fees, academic tutoring, special needs services in the case of a special needs beneficiary, books, supplies, and other equipment which are incurred in connection with the enrollment or attendance of the designated beneficiary of the trust as an elementary or secondary school student at a public, private, or religious school,
- (ii) expenses for room and board, uniforms, transportation, and supplementary items and services (including extended day programs) which are required or provided by a public, private, or religious school in connection with such enrollment or attendance, and
- (iii) expenses for the purchase of any computer technology or equipment...or Internet access and related services, if such technology, equipment, or services are to be used by the beneficiary and the beneficiary's family during any of the years the beneficiary is in school. Clause (iii) shall not include expenses for computer software designed for sports, games, or hobbies unless the software is predominantly educational in nature.

26 U.S.C. § 530(b)(3)(A). In addition, the SAO is "to provide financial assistance to students attending at least four eligible nonpublic schools on a priority basis first to students who are eligible to receive free and reduced-price meals and then to other students based on financial need."

There are no stated requirements for which business entities may receive a grant from DBED other than the contribution must be given to a designated SAO. Moreover, the grants are to be distributed on a "first-come, first-served basis" and DBED must place "an annual cap on the amount of contributions per business entity that are eligible for a grant of up to 50%."

In a nutshell, the program works as follows: a business entity gives a contribution to a designated SAO, the SAO gives financial assistance for qualified education expenses to students who attend nonpublic schools meeting certain requirements, and then the business entity may receive a State grant from DBED of up to 50% of the amount of its contribution to the SAO.

Questions and Answers:

What laws or regulations that protect public school staff, students, and their families from discrimination on the basis of race, ethnicity, gender, sexual orientation, religion, disability, socioeconomic status, or age are applicable to private and religious (nonpublic) schools in Maryland? Could the \$5 million be allocated as grants to businesses that are supporting schools that discriminate in some way, either against students, families, or employees?

Under Maryland law,

All students in Maryland's public schools, without exception and regardless of race, ethnicity, region, religion, gender, sexual orientation, language, socioeconomic status, age, or disability, have the right to educational environments that are:

- A. Safe;
- B. Appropriate for academic achievement; and
- C. Free from any form of harassment.

COMAR 13A.01.04.03. This provision does not apply to nonpublic schools. In addition, Title VI, 42 U.S.C. § 2000d, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Similar protection is given against discrimination on the basis of sex by education programs and activities receiving federal assistance under Title IX, 20 U.S.C. § 1681 or on the basis of a disability under the Rehabilitation Act, 29 U.S.C. § 794.¹ Thus, any nonpublic school that receives federal funding may not discriminate on the basis of race, color, national origin, sex, or disability.

Public school teachers are protected from discrimination on the basis of "race, religion, color, ancestry or national origin, sex, age, marital status, sexual orientation, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment except, as to sex, if the employment of a certain sex is reasonably necessary because of the nature of the employment." Education Article ("ED") § 6-104(b). This provision does not apply to nonpublic schools.

Maryland State law also specifies unlawful employment practices:

An employer may not:

- (1) fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of:
 - (i) the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and

¹ Presidential Executive Order No. 13160, enacted on June 23, 2000, states that "No individual, on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, a Federally conducted education or training program or activity." "Federally conducted education and training programs" include those that are "conducted, operated, or undertaken by" an executive department or agency." 66 Fed. Reg. 5398 (Jan. 13, 2001).

extent so as to reasonably preclude the performance of the employment; or

(ii) the individual's refusal to submit to a genetic test or make available the results of a genetic test.

State Government Article ("SG") § 20-606.

Nevertheless, "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion, sexual orientation, or gender identity to perform work connected with the activities of the religious entity" is exempt from the foregoing provision. SG § 20-604(2). Moreover, the antidiscrimination provision "does not prohibit a school, college, university, or other educational institution from hiring and employing employees of a particular religion, if: (i) the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion." SG § 20-605(a)(3).

Accordingly, a religious nonpublic school may discriminate against teachers or employees on the basis of religion, sexual orientation, or gender identity to perform work connected with the activities of the religious entity. And where the nonpublic school is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or the curriculum is directed toward the propagation of a particular religion, the school may limit its hiring and employment to a particular religion. Moreover, because the school is not a place of public accommodation, I believe that it is possible that they may discriminate against families except where the school accepts federal funding and thus, as mentioned above, is prohibited from discriminating on the basis of race, color, national origin, sex or disability.

Recipients of State aid under the Nonpublic Student Textbook Program, as well as those receiving grants from Aging School Schools Program, have been required to comply with Title VI to receive funds under budget language put in each year. Item 7 in the supplemental budget states that SAO assistance must be given to students who attend a nonpublic school that meets the requirements of Title VI. It is possible, however, that the \$5M appropriated for Student Assistance Organization Business Entity Grants could be used to offset contributions given by businesses to SAOs who have in turn given financial assistance to schools that discriminate against students, teachers, employees or teachers on the basis religion, sexual orientation, or gender identity.

Does the budget language establishing the Nonpublic Textbook Program mean that a person who believes the school has discriminated against them has any ability to file suit under State law to stop or remedy the discrimination? Would a stated requirement in the budget that a school certify that it complies with Maryland anti-discrimination statutes give a victim of gender, disability, sexual orientation, or gender identity the ability to file suit or do anything else to stop or remedy the discrimination?

The State could not extend federal enforcement authority of Title VI against schools who would not otherwise be subject to Title VI. The State, however, can adopt federal

antidiscrimination standards as a condition of receiving State funds, as it has done in the Nonpublic Textbook Program or the Aging Schools Program. At the same time, the budget language would not provide the same remedies available to individuals under the State's antidiscrimination laws. The State could withhold funding or seek reimbursement of funds where discrimination in violation of Title VI standards has occurred. While the language imposes a legally binding budget restriction, I do not believe that the budget language can extend enforcement provisions and remedies available in current law to individuals for antidiscrimination to nonpublic schools not already subject to those provisions.

In addition, there is nothing in the budget language to prohibit a SAO receiving the business entity's contribution or the business entity receiving the DBED grant from discriminating on any basis. For example, several loan and grant programs require participants to comply with the Governor's Code Fair Practices Code. *See, e.g.*, COMAR 05.06.07.05 (nonprofit participating in Community Housing Support Program must certify that it will abide by the Code of Fair Practices); COMAR 34.04.04.09 (Historical and Cultural Museum Assistance Program grant recipients must comply with all applicable federal, State, and local, and Departmental policies prohibiting discrimination). In addition, State Finance and Procurement Article ("SFP"), § 19-101(a) provides:

It is the policy of the State not to enter into a contract with any business entity that has discriminated in the solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or any otherwise unlawful use of characteristics regarding the vendor's, supplier's, or commercial customer's employees or owners.²

The definition for business entity outlined in SFP § 19-103(c) limits the restriction to any business entity that has "submitted a bid or proposal for, has been selected to engage in, or is engaged in providing goods or services to the State." Thus, this restriction would not apply to a business entity receiving a grant under the program in the Supplemental Budget #2, Item 7.

Sincerely,



Sandra Benson Brantley
Counsel to the General Assembly

² The mandatory language to be included in every State contract includes a statement that, among other things, acknowledges that "[t]he company understands and agrees that violation of this clause shall be considered a material breach of this agreement and may result in contract termination, disqualification by the State from participating in State contracts, and other sanctions." SFP § 19-116.