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VIA EMAIL

Secretary Zakiya Smith Ellis
Office of the Secretary of Higher Education
1 John Fitch Plaza,
10th Floor, PO Box 542,
Trenton, NJ 08625-0542

Re: ***In the Matter of Beth Medrash Govoha*** **(OHE 09988-2019)**

Dear Secretary Ellis:

Last night, a special committee of the Board of Trustees of Beth Medrash Govoha met to discuss the two grants that were awarded to BMG in 2013 under the Building Our Future Bond program. Those grants were to facilitate capital projects that were "shovel ready" in 2013 and included the substantial financial commitments BMG has to meet with donor or institutional funds. The special committee reviewed the six-year litigation history challenging the grants, and also discussed the January 6 and January 8, 2020 Orders issued in this proceeding.

It has become apparent to BMG that despite the New Jersey Supreme Court's May 2018 decision – which vacated the Appellate Division's adverse judgment because it disagreed that the State Constitution barred BMG and similar institutions from receiving the grants awarded – the various processes of the State of New Jersey will continue to frustrate BMG's receipt of its two grants and the construction of these projects.

BMG has therefore elected not to continue to pursue these grants through this process.

A brief explanation is in order. The January 6 Order contained a ruling that turned the nature of this proceeding on its head via a *sub silento* ruling that the 2013 grant awards to BMG were void and the applications supporting them no longer approved. This despite years of prior litigation that ended with the Supreme Court vacating the only adverse decision on the grants. BMG filed an interlocutory appeal of that decision that same day and immediately sought a stay of the hearing until that appeal was decided. The January 8 Order denied the stay request.

Taken together, the consequence of those rulings was to create a proceeding requiring BMG to both defend the ultimate legality of the grants awarded and also later reapply for the

grants, which were awarded pursuant to a competitive process, the deadlines for which all expired in 2013. That defies logic and common sense, and sets up a scenario whereby BMG can litigate this case for several more years, prevail again at the Supreme Court and yet still be denied the grant funds because by that time the Secretary of Higher Education cannot legally approve the applications.

The State took other actions that contributed to the interminable delay in the process. It waited the better part of a year after the Supreme Court's May 2018 decision before referring this case for the development of a record. After the Administrative Law Judge properly ruled that the State would continue be a party to the proceeding, the State withdrew the matter from his jurisdiction. It then waited several more months, declared that the State was no longer a party and referred the matter to a different Administrative Law Judge.

At this point it bears repeating that BMG submitted its application for these shovel-ready projects in early 2013, using construction budgets and costs that were relevant at that time. In the ensuing seven years construction costs have soared, BMG's institutional needs have required it to allocate capital in support of other projects and donors have grown more than impatient. The grant amounts awarded and projected budgets will be even less relevant as the legal process continues to drag on – conceivably for another seven years. By the time that process is concluded, the projects are unlikely to be either economically feasible or institutionally relevant. Simply stated, no institution, or those it serves, can wait fourteen years to begin construction on desperately needed new facilities. Since submitting its application for these grants, BMG has initiated and completed construction of 70,000 square feet of alternative space in new buildings.

None of this is fair, nor is it how the State should act toward one of its most important, successful and thriving institutions. BMG remains as committed today as it was in 2013 to the grant program's purposes of "the advancement of student education in New Jersey" and "the promotion of innovation and improvement in the delivery of higher education." There is no denying that BMG's impact on Ocean County has been transformative. BMG's alumni have started well over 3,000 new businesses and created at least 15,000 new jobs. For all of these reasons, BMG is as certain today as it was in 2013 – with the Secretary of Higher Education's agreement – that the projects it proposed would fulfill the purpose of the grant program and that it is entitled to receive the funds awarded to it, just as the other grantee institutions have.

This disparate treatment is particularly troubling to BMG. Nine religiously-affiliated institutions of higher education applied for and have already received funding through the Building Our Future Bond program. Bloomfield College, originally incorporated as The German Theological School of Newark, New Jersey, is affiliated with the Presbyterian Church. Both Centenary College and Drew University are affiliated with the United Methodist Church. The remaining half dozen are affiliated with the Roman Catholic Church, many with specific religious orders thereof: Caldwell University is affiliated with the Sisters of Saint Dominic, Felician University with the Felician Sisters, Georgian Court University with the Sisters of

Mercy, the College of Saint Elizabeth with the Sisters of Charity of Saint Elizabeth, and Saint Peter's University with the Jesuits, while Seton Hall is diocesan.

Yet among all the religiously-affiliated institutions, only BMG has been deemed to have had its grants vacated – despite the fact that the Supreme Court said no such thing. This is precisely the result about which the New Jersey Supreme Court expressed concern when vacating the Appellate Division's judgment. The Supreme Court cautioned that "whether the denial of the requested funds would run afoul of the federal Free Exercise Clause" was a question that "similarly requires factual development." BMG may choose to protect those Free Exercise rights at the appropriate time and in the appropriate federal forum.

In that regard, it is noteworthy that the other religiously-affiliated institutions signed grant agreements containing clauses identical to those in BMG's agreement prohibiting the use of grant funds for religious purposes. But only BMG is being required to provide evidence "whether the promised restrictions, or other curbs, against sectarian use of the grant proceeds at present and into the future are adequate." Does the State believe that it needs more protection against the Jewish use of grant proceeds than it does for the use by the nine other religiously-affiliated institutions? If not, what is the basis for this additional hurdle imposed on BMG?

Wherever and however BMG vindicates its Free Exercise rights to receive "a public benefit for which it is otherwise qualified" (*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017)), it regrettably shall not be in this process.

BMG is certain that it will continue to thrive and grow, its students will continue to succeed both in and out of the classroom and the culture and traditions they maintain will continue to be perpetuated long after those who are opposed to them are forgotten.

BMG is withdrawing its pursuit of these grant funds through any State processes. It maintains its right to vindicate its Free Exercise rights under the United States Constitution.

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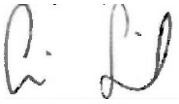
Sincerely,



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