



State of New Jersey

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BRIAN K. BRIDGES, PH.D.
SECRETARY OF HIGHER EDUCATION

PHILIP D. MURPHY
GOVERNOR

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LT. GOVERNOR

September 14, 2021

Jeanne LoCicero
ACLU-NJ
PO Box 32159
Newark, NJ 07102

Avi Schick, Esq.
Troutman Sanders, LLP
875 3rd Avenue
New York, NY 10022

Dear Ms. LoCicero and Mr. Schick:

As you are aware, this matter was before me on remand from the Supreme Court following its opinion in ACLU v. Hendricks, 233 N.J. 181 (2019). At issue was whether the Secretary may award grants to Beth Medrash Govoha (“BMG”) as part of a state program to subsidize facility and infrastructure projects for higher education institutions in New Jersey. BMG applied for and received grants to fund the construction of a new library and research center and a three-story academic center. The ACLU of New Jersey, joined by similarly-interested parties, (collectively “ACLU-NJ”) challenged the awarded grants as violating three provisions of the State Constitution: the Religious Aid Clause as set forth in Article I, Paragraph 3, the Establishment Clause as set forth in Article I, Paragraph 4, and the Donation Clause as set forth in Article VIII, Section 3, Paragraph 3. The ACLU also contended that the grants violate the New Jersey Law Against Discrimination (“NJLAD”).

The Appellate Division invalidated the grants, holding that they violated the Religious Aid Clause of the State Constitution. The panel did not address the ACLU’s other arguments pertaining to the Establishment Clause, the Donation Clause, or the NJLAD.

On certification, the Supreme Court determined that the record, comprised of the grant applications submitted by BMG to the Secretary, was incomplete and “that an informed administrative decision could not have been made without the benefit of [a proper] record.” Hendricks, 233 N.J. at 185. More specifically, it found that the record did not reveal enough

about “the nature of the educational training and curriculum offered by the Yeshiva and Seminary and how it is delivered, nor does the record present sufficient detail about how the grant fund projects will be put to use in the institutions' respective settings.” Id. at 200. In order to discern these critical facts, the Court felt it “imperative that those issues be more fully developed below, through the crucible of an adversarial process, before the constitutional questions raised in this matter are addressed.” Ibid. Thus, the Court remanded the matter to the Secretary for the development of a proper record with fact-finding “prior to the ultimate administrative decision of the Secretary concerning the challenged grant.” Id. at 185.

Consistent with that directive, the Secretary transmitted the matter as a contested case to the Office of Administrative Law on July 15, 2019. The Secretary sought fact-finding on the following issues, as directed by the court:

- (1) whether BMG is inherently sectarian in nature;
- (2) whether, in the setting of BMG’s curriculum and training programs , the grant funds will necessarily be used in the “maintenance of any minister or ministry”;
- (3) whether the promised restrictions, or other curbs, against sectarian use of the grant proceeds at present and into the future are adequate;
- (4) the nature of the educational training and curriculum offered by BMG and how it is delivered; and
- (5) how the grant fund projects will be put to use at BMG.

[Hendricks, 235 at 201.]

On January 10, 2020, following disagreement by the parties regarding the procedural posture and scope of the hearing, BMG ultimately withdrew “its pursuit of these grant funds through any State processes” and the matter was returned to the Secretary and closed.

BMG then submitted a written request on June 14, 2021 (attached), to have the matter reopened and to continue with the process, with the caveat that the scope of the hearing be limited to the use of the grant funds. It also requested that the fact finding and conclusions of law be developed and considered consistent with the United States Supreme Court opinion in Espinoza v. Montana Dep’t of Revenue, 591 U.S. ___, (2020).

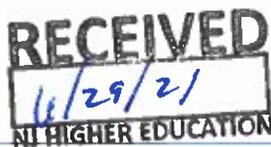
Upon consideration of BMG’s request, I have determined to reopen this matter and retransmit it as a contested case to the Office of Administrative Law. As the Supreme Court

indicated, the remaining factual disputes require resolution before I can make a properly informed decision on BMG's grant application. Hendricks, 235 at 185. Thus, I will remain neutral and objective throughout the process so that I am able to issue a fair and unbiased final agency decision following the Initial Decision of the ALJ. As to BMG's request to limit the scope of the hearing, I am constrained to follow the directive of the Supreme Court, which identified the "questions for exploration" as outlined above. Certainly, the scope of the hearing and ultimate decision will take into consideration all relevant and binding state and federal case law, including any intervening case law that may inform the necessary fact-finding.

Sincerely,

A handwritten signature in black ink, appearing to read "B. K. Bridges". The signature is stylized with a large initial "B" and a long horizontal stroke extending to the left.

Dr. Brian K. Bridges
Secretary of Higher Education



Avi Schick
avi.schick@troutman.com

June 14, 2021

The Honorable Dr. Brian Bridges
Secretary
Office of the Secretary of Higher Education
1 John Fitch Plaza
10th Floor, PO Box 542
Trenton, NJ 08625-0542

Re: Beth Medrash Govoha (Building Our Future Grants #006-01 and #006-02)

Dear Secretary Bridges:

I am writing on behalf of Beth Medrash Govoha ("BMG"), one of the most distinguished institutions of higher education in the State of New Jersey. Since its founding in 1943, BMG has grown from its initial enrollment of barely a dozen students to a thriving institution that has an enrollment of more than 7,100 undergraduate and graduate students.

BMG is a success by any measure. It is rooted in the Jewish tradition, and its graduates have assumed leadership positions in Jewish communities throughout the United States and across the world. According to the National Association of State Boards of Accountancy, BMG students have for many years maintained a higher first-time pass rate on the Certified Public Accountant examination than any other college in New Jersey. And BMG graduates have gone on to elite graduate and professional schools at a rate that is unmatched by any other New Jersey college other than Princeton. Over the past 5 years alone, forty of our graduates have gained admission to Ivy League and other Top 10 law schools.

BMG has also contributed immeasurably to the well-being of its community and the State of New Jersey. Students come from more than 20 states and numerous foreign countries to study at BMG, and a large number remain committed to New Jersey after graduation, as homeowners, businessmen, and successful members of just about every profession. According to a 2019 Economic Impact Report, BMG alumni have created more than 3,000 businesses employing over 11,000 people in Lakewood alone. The report credits the BMG community with paying more than \$207 million in annual property taxes and hundreds of millions in other state and local taxes.

With this track record, it is no surprise that BMG was awarded two Building Our Future grants in 2013. Yet eight years later, BMG has not seen any of the funds it was awarded.

The holdup is due to a meritless lawsuit filed by the American Civil Liberties Union, which alleged that the New Jersey Constitution does not permit funds to be awarded to an institution such as BMG that is alleged to be “pervasively sectarian.” Both the State and BMG have long disputed those claims. More importantly, in 2020 the United States Supreme Court entirely foreclosed those claims in its decision in *Espinoza v. Montana Dep’t of Revenue*.

Espinoza prohibits a state from relying on its constitution to disqualify an institution from a grant program because of its religious character. Yet that is precisely the claim that has created a years-long long delay in disbursing the two grants to BMG. Now that the United States Supreme Court has spoken definitively about the inability of a state to disfavor religious educational institutions in grant programs it administers, your office should proceed with the grant disbursements.

Background

As you may be aware, in 2018 the New Jersey Supreme Court vacated a lower court decision that had invalidated the grants to BMG. *American Civil Liberties Union of New Jersey v. Hendricks*, 233 N.J. 181, 186 (2018). The Supreme Court explained that “the State maintains that the proper constitutional analysis in this matter turns on the use to which these higher education institutions will put the monies, not the nature of the institution themselves” while plaintiffs “emphasize the pervasively sectarian nature of the institutions.”

The New Jersey Supreme Court remanded the matter to the Secretary of Higher Education to develop the record regarding “how the grant fund projects will be put to use.” *Id.* at 200-201. The Secretary of Higher Education thereafter transmitted the matter to the Office of Administrative Law, withdrew the transmittal, and then retransmitted it to a different Administrative Law Judge. See *ACLU of New Jersey et al v. Hendricks*, OHE 02286-2019 & *In the Matter of Beth Medrash Govoha*, OHE 09988-2019. In the second transmittal letter, the Secretary of Higher Education indicated that a record should be developed not only about “how the grant fund projects will be put to use,” but also to ascertain whether BMG was “inherently sectarian in nature.”

BMG immediately objected to this unwarranted expansion of the scope of the hearing. Nonetheless, in furtherance of developing a record, BMG produced and discussed its planned use for the grant funds, including the details of the projects for which the grants were awarded. BMG subsequently laid out its significant concerns with the manner in which the hearing was proceeding in a letter to Secretary Smith Ellis dated January 10, 2020, and indicated that it was withdrawing from the hearing but not abandoning the grants. BMG retained the rights to continue to pursue the grants, and reiterated this in a December 23, 2020 letter to you. Copies of both letters are attached.

The Supreme Court’s Decision In *Espinoza*

After the Supreme Court’s decision in *Espinoza* it is untenable for the State (or the ACLU) to suggest that the supposedly pervasively sectarian nature of BMG renders it ineligible to participate in the Building our Future bond program. As Chief Justice Roberts succinctly summarized: “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”

Under *Espinoza*, the ACLU's position that the "sectarian nature" of BMG may in some way justify the continued withholding of the grant funding is indefensible and unconstitutional. The ACLU lawsuit argued that the scope of the New Jersey Constitution's prohibitions on aid to religious institution was broad. The State disputed that characterization, and argued that the grants awarded to BMG were not within its ambit. The *Espinoza* decision makes that debate irrelevant.

If the ACLU's interpretation of the New Jersey Constitution was correct (and it was not), *Espinoza* instructs that the state constitutional provision would violate the Free Exercise Clause of the United States Constitution: "A State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause.'"

Just as with Montana in *Espinoza*, New Jersey has decided to make grants to private schools. In fact, all 15 of the private colleges and universities that applied for Building our Future grants were awarded grants. *Espinoza* prohibits withholding BMG's approved grant funds based on an inchoate concern about its "inherent" nature.

To put it in the simplest terms, BMG cannot be denied the grants it was awarded merely because of "who we are." The only inquiry can be about how we intend to spend the grant funds. And the State has already made BMG sign a grant agreement that prohibits the use of any grant funds for religious instruction or religious worship.

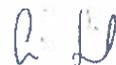
Where We Go From Here

When the Secretary of Higher Education initially transmitted the matter to the Office of Administrative Law, the Administrative Law Judge correctly determined that the State would remain a party to the proceeding. *ACLU of New Jersey et al v. Hendricks*, OHE 02286-2019.

BMG and its more than 7,100 students have waited long enough for the grant funds. We would like to move forward, and believe that the State can (upon notice to the ACLU) begin to disburse the funds. But if the State feels that there must be a determination by the Office of Administrative Law, we respectfully request that the State make the referral without any further delay, and that the referral be limited to the only relevant question: the use of the grant funds. And the State, which has defended the grants through years of litigation, should remain a party to the proceeding.

BMG looks forward to bringing bring this mater to an appropriate conclusion, and hopes this can be accomplished collaboratively in a manner that avoids further delay.

Sincerely,



Avi Schick

Enclosures

ATTACHMENTS