

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 1060 (Senator Kagan, *et al.*)
Judicial Proceedings

Nonpublic Elementary and Secondary Schools - Discrimination - Prohibition

This bill prohibits a nonpublic elementary or secondary school that receives State funds from refusing enrollment of, expelling, withholding privileges from, or otherwise discriminating against any student or prospective student because of the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability. The bill establishes that such acts are "unlawful education practices" and establishes remedies for violations.

The bill also establishes that if a nonpublic elementary or secondary school receives State funds, State law provisions regarding employment discrimination apply with respect to the employment of individuals who are not ministerial employees.

Fiscal Summary

State Effect: General fund expenditures increase for the Maryland Commission on Civil Rights (MCCR) to the extent it has to investigate additional complaints, as discussed below. The bill is not anticipated to materially impact the workload of the Judiciary or the Office of Administrative Hearings.

Local Effect: The bill is not anticipated to materially impact the workload of the circuit courts.

Small Business Effect: Potential meaningful for nonpublic schools that are small businesses.

Analysis

Bill Summary: The bill's provisions do not apply to, (1) with respect to discrimination on the basis of sex, a school that limits, and continually since the time of its establishment has limited, admission to students of only one sex and (2) with respect to discrimination on the basis of religion, a school that is affiliated with a religious institution. The bill's provisions do not require a school to enroll, retain, or extend privileges to a student or prospective student who does not meet the usual and regular qualifications, requirements, and standards of the school as long as the denial is not based on discrimination on the specified grounds.

If a complaint is filed with MCCR and an agreement to remedy and eliminate the discrimination cannot be reached, the matter may be heard before an administrative law judge (ALJ). Remedies available on a finding that the respondent is engaging or has engaged in an unlawful education practice include (1) enjoining the respondent from engaging in the discriminatory act; (2) ordering appropriate affirmative relief; (3) awarding compensatory damages; and (4) ordering any other equitable relief that the ALJ considers appropriate.

A complainant or a respondent may elect to have the claims asserted in a complaint alleging an unlawful education practice determined in a civil action brought by MCCR on the complainant's behalf if (1) MCCR has found probable cause to believe the respondent has engaged or is engaging in an unlawful education practice and (2) there is a failure to reach an agreement to remedy and eliminate the practice. MCCR may also elect to have the claims asserted within the complaint determined in a civil action brought on its own behalf under the same conditions. If an election for a civil action is made, MCCR must file, within 60 days after the election, a civil action in the circuit court for the county where the alleged discrimination occurred. On a finding that discrimination occurred, the court may provide the remedies specified above.

A complainant may file a private civil action against the respondent if (1) the complainant initially filed a timely administrative charge or a complaint under federal, State, or local law alleging an unlawful education practice; (2) at least 180 days have elapsed since the filing of this complaint or charge; and (3) the civil action is filed within two years after the alleged discrimination occurred. In addition to the remedies specified above, the court may award punitive damages if (1) the respondent is not a governmental unit or political subdivision and (2) the court finds that the respondent has engaged or is engaging in an unlawful education practice with actual malice. The filing of a private cause of action automatically terminates any proceeding before MCCR based on the underlying administrative complaint and any amendment to the complaint. Any party may demand a jury trial if a complainant seeks compensatory or punitive damages. Pursuant to § 20-1015

of the State Government Article, a court may award the prevailing party in a civil action reasonable attorney's fees, expert witness fees, and costs.

Although not shown in the bill, employment discrimination complaints authorized by the bill for specified nonpublic school employees follow the process specified in current law.

If a respondent is found by an administrative law judge or a court to have engaged in or to be engaging in an unlawful employment practice or an unlawful education practice, the respondent must repay to the State general fund all State funds received during the time the unlawful practice occurred.

Current Law/Background: State regulations establish that all public school students, regardless of race, ethnicity, region, religion, gender, sexual orientation, language, socioeconomic status, age, or disability have the right to educational environments that are safe, appropriate for academic achievement, and free from harassment. State law also requires *all* individuals who are ages 5 or older and younger than age 21 to be admitted, free of charge, to the public schools of the State.

Federal Nondiscrimination Laws

Numerous provisions of federal law prohibit discrimination in education. The federal Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. Private schools receiving federal funds must comply with federal law provisions regarding discrimination. For example, the federal Civil Rights Act of 1964 also prohibits discrimination by recipients of federal funds on the basis of race and national origin. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by private schools receiving federal funding. Federal law includes exceptions for the admissions practices of single-sex schools. The Americans with Disabilities Act (ADA) also prohibits state and local governments from discriminating on the basis of disability. Private schools not run or controlled by religious organizations must abide by the ADA.

State Aid to Nonpublic Schools

No State law directly applies to private schools that receive State funds to prohibit them from discrimination. However, pursuant to language in Chapter 150 of 2017 (the fiscal 2018 budget bill), a nonpublic school participating in the Aid to Non-Public Schools Program or the Broadening Options and Opportunities for Students Today (BOOST) must certify compliance with Title 20, Subtitle 6 of the State Government Article, which prohibits discrimination in employment. A nonpublic school participating in the program may not discriminate in student *admissions* on the basis of race, color, national origin, or

sexual orientation. A nonpublic school that does not comply with these requirements must return the BOOST scholarship funds and may not charge the student tuition and fees instead. The only other legal remedy for a violation of these provisions is ineligibility for participation in the program. The budget bill also specifies that nonpublic schools must comply with Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, color, or national origin.

The State provides some aid to nonpublic schools using special funds from the Cigarette Restitution Fund, which includes the State's share of the national tobacco settlement. All of the programs are administered by the Maryland State Department of Education (MSDE). There is a nonpublic school aid program for textbooks, computer hardware, and computer software that are secular (*i.e.*, nonreligious) in character and acceptable for use in any public elementary or secondary school in Maryland for use by students in eligible schools. The proposed fiscal 2019 budget includes \$6.0 million in such funding; the program has been funded at this level in recent years. MSDE assures that the purchases are made from a list of qualified vendors and that the savings are used by the schools to reduce the cost of textbooks and computer hardware and software for students. To be eligible to participate in the program, a nonpublic school must hold a certificate of approval or be registered with the State Board of Education; not charge more tuition than the statewide average per pupil expenditure by local education agencies (LEAs), as calculated by the department; and meet the nondiscrimination requirements as specified above.

The State also provides some scholarship aid for students who are eligible for free- and reduced-price meals to attend nonpublic schools, known as the BOOST program, subject to several specified conditions specified in the budget bill. The amount of a scholarship may not exceed the statewide average per pupil expenditure by LEAs or the tuition of the nonpublic school, whichever is less. To be eligible to participate in the program, a nonpublic school must participate in the aid to nonpublic schools for textbooks and computer hardware and software program described above. The fiscal 2018 budget includes \$5.5 million for the program; the proposed fiscal 2019 budget includes \$8.85 million for the program.

In addition, the State provides capital funding for the Nonpublic Aging Schools Program. To be eligible to participate in the program, like BOOST, a nonpublic school must participate in the textbook and computer hardware and software program. Other eligibility requirements are specified in Chapter 22 of 2017 (fiscal 2018 capital budget bill). The proposed fiscal 2019 capital budget includes \$3.5 million for the program, the same funding level as recent years.

In fiscal 2018, funding awards were rescinded from a Harford County Lutheran school after the BOOST Advisory Board was alerted that language in the school's handbook reserved the right to deny admission to gay and transgender students.

Enforcing Employment Discrimination

An individual alleging employment discrimination may file a complaint with MCCR. If a complaint is filed with MCCR and an agreement to remedy and eliminate the discrimination cannot be reached, the matter may be heard before an administrative law judge. Remedies available on a finding that the respondent is engaging or has engaged in an unlawful employment practice include (1) enjoining the respondent from engaging in the discriminatory act; (2) ordering appropriate affirmative relief; (3) awarding compensatory damages for pecuniary and nonpecuniary losses; and (4) ordering any other equitable relief that the administrative law judge considers appropriate.

A complainant or a respondent may elect to have the claims asserted in a complaint alleging an unlawful employment practice determined in a civil action brought by MCCR on the complainant's behalf if (1) MCCR has found probable cause to believe the respondent has engaged or is engaging in an unlawful employment practice and (2) there is a failure to reach an agreement to remedy and eliminate the practice. MCCR may also elect to have the claims asserted within the complaint determined in a civil action brought on its own behalf under the same conditions. If an election for a civil action is made, MCCR must file, within 60 days after the election, a civil action in the circuit court for the county where the alleged discrimination occurred. On a finding that discrimination occurred, the court may provide the remedies specified above.

A complainant may file a private civil action against the respondent if (1) the complainant initially filed a timely administrative charge or a complaint under federal, State, or local law alleging discrimination; (2) at least 180 days have elapsed since the filing of this complaint or charge; and (3) the civil action is filed within two years after the alleged discrimination occurred. In addition to the remedies specified above, the court may award punitive damages if (1) the respondent is not a governmental unit or political subdivision and (2) the court finds that the respondent has engaged or is engaging in discrimination with actual malice. The filing of a private cause of action automatically terminates any proceeding before MCCR based on the underlying administrative complaint and any amendment to the complaint. Any party may demand a jury trial if a complainant seeks compensatory or punitive damages. Pursuant to § 20-1015 of the State Government Article, a court may award the prevailing party in a civil action reasonable attorney's fees, expert witness fees, and costs.

State Expenditures: General fund expenditures increase, at least minimally, to the extent that any new complaints are filed and to train staff on investigating allegations of education discrimination. MCCR advises that it receives federal reimbursement for investigating complaints related to housing discrimination from the Department of Housing and Urban Development and for investigating employment discrimination from the Equal Employment Opportunity Commission. Accordingly, MCCR needs to ensure that

investigating any additional cases regarding education discrimination does not negatively impact its case closure rate, which may impact federal funding. Although existing staff can potentially investigate a small number of additional cases after being trained, additional investigators are necessary to the extent that MCCR receives a large number of complaints. *For illustrative purposes only*, for every additional investigator required, general fund expenditures increase by a minimum of \$75,000 annually.

Small Business Effect/Additional Comments: Nonpublic schools receiving State funding that discriminate against students based on specified criteria will be subject to the remedies specified above. MSDE advises that the majority of nonpublic schools do not hold approval to implement Individualized Educational Programs, and may therefore incur additional costs in order to be equipped to adequately educate students with disabilities.

Additional Information

Prior Introductions: SB 849 of 2017, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 696, received a hearing in the House Ways and Means Committee, but no further action was taken. SB 948 of 2016, a similar bill, was withdrawn.

Cross File: Although designated as a cross file, HB 1565 (Delegate McCray, *et al.*- Ways and Means) is not identical.

Information Source(s): Maryland Commission on Civil Rights; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Department of Legislative Services

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nb/rhh

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