

BALTIMORE BOMBSHELL: FEDERAL COURT RULES PRIVATE SCHOOL'S NONPROFIT STATUS LEADS TO TITLE IX COVERAGE

Insights
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In a decision that should put the nation's private and independent school community on notice, a federal judge in Baltimore recently ruled that a school's nonprofit status in and of itself constituted the receipt of federal financial assistance – which means that it is subject to Title IX requirements, among other things. For now, the July 21 decision only impacts schools in Maryland, and is almost certain to be appealed (and could even be blocked from going into effect during the appeal process). But this could be the beginning of a trend that could catch on elsewhere, meaning that all private tax-exempt schools should review this ruling and be on guard to adapt your policies and practices if necessary.

What Happened?

A group of former students sued Baltimore-based Concordia Preparatory School alleging sexual assault and harassment based on the alleged actions of other students dating back to 2016. The former students brought claims under Title IX of the Education Amendments of 1972 — commonly just known as Title IX – which prohibits discrimination on the basis of sex in any education program or activity.

The school asked the court to dismiss the lawsuit. It argued that it was not a direct recipient of federal financial assistance, which is a requirement for any school to be subject to Title IX.

Judge Richard Bennett from the District of Maryland denied the school's request and cleared the lawsuit to proceed. He

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concluded that the school's tax-exempt status, in and of itself, constitutes "federal financial assistance" for the purpose of Title IX and other similar statutes. **"The tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution,"** Judge Bennett said. "The school cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX."

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In his ruling, he acknowledged that neither the U.S. Supreme Court nor the federal appeals court overseeing his court had directly addressed this issue. But he did say that both courts have issued rulings that guided his decision:

- He cited to SCOTUS cases where the Court ruled that an institution can be considered a recipient of federal assistance even if it did not directly apply for the aid.
- He also cited to a key 1983 SCOTUS case that said "tax exemptions...are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."
- Finally, he pointed to another local federal district court that ruled that institutions receiving tax exemptions have a higher responsibility than others, and should not be encouraged to engage in activities "that are illegal or contrary to public policy."

What Does it Mean for Private and Independent Schools?

Regardless of how unusual this decision may seem, you should not simply stick your head in the sand and ignore the ruling. After all, it does come from a federal district court and essentially has immediate effect. The school caught up in this lawsuit will have to live with the consequences of this ruling in the immediate litigation, defending itself against Title IX claims. And other schools in Maryland should be especially on guard for copycat litigation making these same arguments.

But there are some reasons to take this decision with a grain of salt. After all:

- This decision is limited to just one jurisdiction. It directly impacts approximately 800 private schools in Maryland, about 2% of all nonprofit schools in the country.

- Given this case could have such a profound impact, the school involved will no doubt appeal the ruling – and will likely have the backing of private school associations that will ensure the strongest arguments possible will be put forth.
- The judge who issued the ruling admitted that his was the first such ruling in the country to go so far, which is a statement that usually sends alarm bells off for appeals court judges.
- The decision runs contrary to the way that federal administrative agencies have operated for decades, regardless of which political party occupies the White House.
- The judge involved in this case has had another high-profile ruling overturned on appeal. In 2007, he presided over a First Amendment case against the Westboro Baptist Church and made several controversial rulings that were eventually reversed by the U.S. Supreme Court.

What Should You Do?

Given all of that, how you proceed will be governed by your risk tolerance level. If you are located in Maryland, you will want to take this decision more seriously for the time being, but schools outside of Maryland may want to take a more wait-and-see approach.

If you want to take the most conservative approach and proceed as if you are now subject to Title IX, you should seek assistance from your school's legal counsel to determine how best to come into compliance with your obligations. This may include modifying policies, procedures, postings, and investigations. Keep in mind that Title IX has broad application to both students and employees, and not only with respect to athletics. In addition to Title IX, this decision may also mean that your school also has obligations under Section 504 of the Rehabilitation Act, the Family Educational Rights & Privacy Act (FERPA), Title VI, and other similar laws.

In that regard, [as mentioned in our recent Insight](#), your school could also be considered to have received federal financial assistance through other means (such as unforgiven PPP or EIDL loans obtained during the early days

of the pandemic). If that's the case, you should ensure you are in compliance with the laws' obligations.

For schools that want to put themselves in a better position to adapt should this decision spread further and take hold in other jurisdictions, you can use this as an opportunity to beef up your overall understanding of Title IX and the other laws that this decision implicates (Section 504 of the Rehab Act, FERPA, Title VI, etc.). You may also want to revisit the way you conduct your investigations into alleged misconduct, as you could be held to a higher standard.

Fisher Phillips offers training and a compliance kit to assist schools with Title IX compliance. Our lawyers also provide guidance on Section 504, FERPA, Title VI and similar federal regulations. Contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Education Practice Group](#) for more information.

Other schools may wish to simply track this decision and bank on the fact that it will be overturned or never reach their jurisdiction. Such a course of action may be prudent for some institutions – as long as you make the decision with open eyes and understand the possible repercussions should things change in the near future.

Conclusion

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Education Practice Group](#).