Arizona Has Entered the Chat: Federal Court Rules That Non-Profit Schools Are Not Subject to Title IX

Insights
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After two federal courts in Maryland and California ruled that private schools were subject to Title IX just by virtue of being non-profit, an Arizona court has weighed in with the opposite view and given hope to schools concerned about ever-expanding legal obligations they face at every turn. The December 11 decision in *Doe v. Horne* needs to be celebrated cautiously, however, as schools still face an uncertain future in this area. What do you need to know about this next step in what could turn out to be a rollercoaster ride in 2024?

Schools Face Upheaval Thanks to 2 Bombshell Decisions

Before July 2022, we all thought the law was fairly settled in this area. Non-profit schools that did not accept traditional federal financial assistance such as grants or loans were not subject to Title IX and other federal laws. Or so we thought.

But in the span of just a few days in July 2022, federal courts in Maryland and California each independently ruled that a school's nonprofit status automatically led it to be subject to Title IX. They each concluded that a school should be considered to have received federal financial assistance just by being classified as a nonprofit entity. You can read more about these decisions here and here.

Arizona Court Steadies the Ship

Nothing much happened in this area of the law for over a year. But just before the holiday break, a federal district court in Arizona considered this very same question – whether 501(c)(3) status is considered "federal financial assistance" requiring compliance with Title IX. The court in that case said no – being exempt from certain federal taxes is not the same as federal financial assistance as outlined in Title IX and its regulations.

The court drew a comparison between the types of affirmative grants of federal resources that are listed in Title IX's regulations as being federal financial assistance and 501(c)(3) status. As per the court's order, "the bestowment of 501(c)(3) status does not, by and in itself, provide the 501(c)(3) organization with federal money, property, or services." In other words, being a non-profit does not directly or automatically provide the organization federal dollars.

The court also noted that Title IX and other similar federal laws operate on something of a contract basis. The government agrees to provide schools funds, and the school in turn agrees to be covered by certain laws. But, as the court notes, "there is no indication that Congress intended to condition the receipt of 501(c)(3) tax exempt status on an entity's promise to comply with federal antidiscrimination statutes."

What Does This Mean For Your Schools?

The answer is a classic lawyer-ism: it depends.

For now, private and non-profit schools in Arizona that are 501(c)(3) organizations and do not take federal financial assistance can feel confident that they are not subject to Title IX. For schools in the rest of the country, it is less clear.

Courts are always watching one another, so this order is a helpful step in the right direction but is not binding outside the state of Arizona. That being the case, if a court in your jurisdiction were to rule that non-profit status automatically means you are subject to Title IX, using this Arizona case in your defense may not mean very much. While you might cite it as a persuasive comparison, no doubt your opponent will cite the Maryland and California cases.

What's Next?

This case is in its early stages, and whether it is appealed to the 9th Circuit Court of Appeals – which includes both California and Arizona – remains to be seen. That appeals court is the largest federal circuit court in the country, and a ruling there would affect about 20% of the U.S. population. But appeals take time, so don't expect movement there until late 2024 at the earliest.

Meanwhile, the Maryland case is currently on appeal to the 4th Circuit Court of Appeals. Oral arguments are scheduled for later this month. A ruling by that appeals court would be binding on schools in Maryland, Virginia, North Carolina, South Carolina, and West Virginia – and would be a lot more persuasive for courts around the country than decisions from lower trial courts we've seen so far.

The California case settled out of court in July of this year, so we can't expect to arrive at any clarity from that case.

What Should You Do?

Given all of that, how you proceed will be governed by your risk tolerance level. Schools in Arizona can feel somewhat comfortable for now, those in Maryland and California need to take this issue more seriously for the time being, and schools outside of those states 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, 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, these decisions may also mean that your school 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 pandemic-era 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 these decisions may implicate (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 these decisions and bank on the fact that the Maryland and California cases will soon be considered outliers – to soon be overturned or maybe 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 continue to monitor this case in Arizona, the Maryland case that is on appeal, as well as similar cases across the country – so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If your school is interested in learning more about the implications of your school receiving federal financial assistance or Title IX compliance, as well as other similar laws and regulations, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Education Practice Group for additional information.

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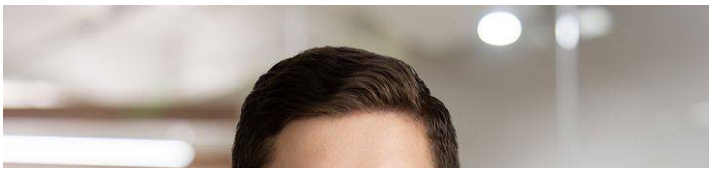

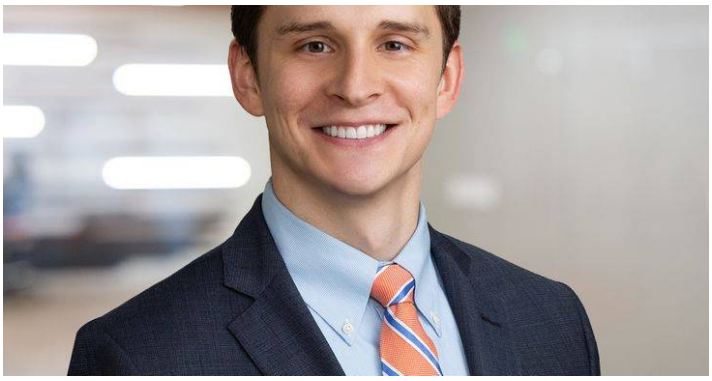

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