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Are Nonprofit Private Schools Still Safe from Title IX Lawsuits?

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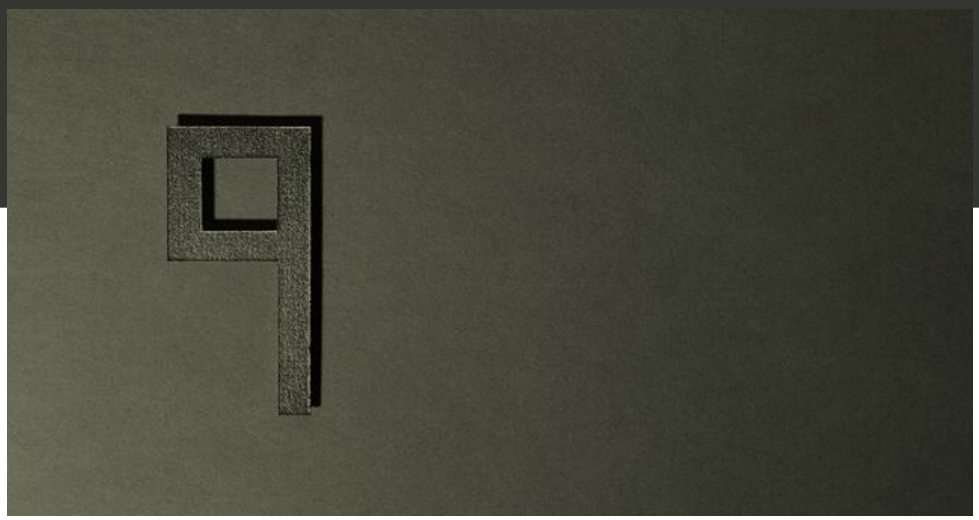

For the nation's nonprofit private schools, the summer of '22 was a time for planning a new term against the backdrop of two years of a devastating pandemic that had not yet fully released its grip.

Then, in late July 2022, federal district judges on opposite coasts issued back-to-back, precedent-busting, rulings that rocked this segment of the 501(c)(3) community.

First, in Baltimore, a federal district judge "…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…" See *Baltimore Bombshell: Federal Court Rules Private School's Nonprofit Status Leads to Title IX Coverage* (July 27, 2022) Suzanne K. Bogdan, Esq., & Kristin L. Smith, Esq., *FisherPhillips LLP.* Then, "just days after … [that] court dropped a bombshell on the nation's private and independent school community, … a California federal court joined the fray…." See *California Joins the Fray: Another Court Rules that Nonprofit Schools are Subject to Title IX* (July 28, 2022) Suzanne K. Bogdan, Esq., & Kristin L. Smith, Esq., *FisherPhillips LLP*.

We covered both stories back then: *Two Federal Courts Apply Title IX to Nonprofit Schools* (August 4, 2022) ["According to the education law experts at Fisher & Phillips LLP, these two late-July rulings, flying well below almost everyone's radar, could turn out to be a big deal.']

Why is it a big deal? Because many independent private schools – particularly those aligned with religious denominations – intentionally avoid applying for or accepting federal funding precisely so they are not bound by the Title IX requirements and restrictions.

In the past two weeks or so, there's been a flurry of renewed interest in these cases because of major developments that largely undo the confusion and uncertainty of this pair of outlier trial-level

rulings.

A Quick Look at Title IX

Title IX of the Education Acts of 1972 is a landmark federal anti-discrimination law.

It reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

That is to say: "A recipient institution that receives Department funds must operate its education program or activity in a nondiscriminatory manner free of discrimination based on sex, including sexual orientation and gender identity."

The U.S. Department of Education explains here, that this language covers a broad swath of activities including – for example – "recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment, which encompasses sexual assault and other forms of sexual violence; treatment of pregnant and parenting students; treatment of LGBTQI+ students; discipline; single-sex education; and employment."

Most particularly, "[l]ike other federal anti-discrimination measures, the hook for Title IX to apply is receiving "federal financial assistance." But that phrase is undefined in the statute."

The plaintiffs in both the Baltimore, Maryland and the San Luis Obispo, California, lawsuits are the type of claimants described in Title IX so long as the defendant-schools are subject to Title IX at the time of the allegations by virtue of having received "Federal financial assistance."

The Baltimore plaintiff (later joined by several other female students) alleges she was a student at defendant Concordia Preparatory School during the 2017–18 academic year, at which time she was "sexually harassed, assaulted, and bullied at school."

The San Luis Obispo plaintiff was a "high school football player who competed in a game against Valley Christian Academy in March 2021 without incident – until removing her helmet at the end of the game revealing herself as female. Valley Christian followed several days later by directing a letter to her school indicating that she was not welcome to play football on their field again because of the "guiding principles of the Bible regarding the care of a woman."

New Developments – East Coast

On this specific legal issue here – namely, whether Title IX applies to nonprofit independent schools solely because of their tax exemptions – there is a major development in the Maryland case. Recently, the Fourth Circuit reversed the trial court's decision.

The 2022 ruling "…that mere 501(c)(3) status can trigger obligations under Title IX…." deviated from fifty years of interpretation and implementation of Title IX. It "created shock waves throughout the private independent school community." *Fourth Circuit Holds Federal Tax-Exempt Status Does Not Subject Private Independent School to Title IX Responsibility* (April 3, 2024) Gregory Keating, Esq., *Epstein Becker Green.*

On March 27, 2024, in "… a long-awaited decision that carries major implications for 501(c)(3) organizations and independent schools," the Fourth Circuit Court of Appeals unanimously and unequivocally reversed the trial judge's reasoning, analysis, and conclusion. See *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n.* (4th Circuit), reversing and remanding *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n,* (D. Md. July 21, 2022) No. 20-3132, 2022 WL 2869041.

The Fourth Circuit ruled that "an independent school's 501(c)(3) tax-exempt status did not constitute federal financial assistance for purposes of Title IX of the Education Amendments of 1972." See *Fourth Circuit: School's 501(c)(3) Status Does Not Constitute Federal Financial Assistance for Title IX Purposes* (April 1, 2024) Daniel Masakayan, Esq., et al, *McGuireWoods LLP.*

Fourth Circuit Judge Stephanie D. Thacker, writing for the three-judge panel, explained: "Like other federal anti-discrimination measures, the hook for Title IX to apply is receiving federal financial assistance. But that phrase is undefined in the statute …. Therefore, in this case, we are tasked with determining whether § 501(c)(3) tax exempt status equates to 'receiving Federal financial assistance' so that Title IX applies."

She continued: "Tax exemption is not 'Federal financial assistance.' This is not a novel concept. Indeed, since Title IX's inception over fifty years ago, it has never been applied to organizations based solely on their tax exempt status. And for good reason. Although tax exemption is a tax benefit, that does not mean it is 'Federal financial assistance' for Title IX purposes."

In *Fourth Circuit Clarifies Contours of Laws Applicable to Tax-Exempt Entities* (April 11, 2024) Vanessa Huber, Esq., *Clark Hill PLC*, adds: "This is now the sole federal appellate ruling addressing – and rejecting – the specific theory that merely receiving 501(c)(3) tax-exempt status is sufficient without more to meet the Title IX 'hook' of 'Federal financial assistance.'"

See also: *A Sigh of Relief for Private Schools: 4th Circuit Rules Tax-Exempt Status Does Not Trigger Title IX Coverage* (March 28, 2024) Brian Guerinot, Esq., & Kristin L. Smith, Esq., *FisherPhillips LLP.* "A federal appeals court ruled yesterday that Title IX does not apply to a private school based purely on its nonprofit status, reversing a lower court's bombshell decision that put the entire private and independent school community on notice. This decision by the 4th U.S. Circuit Court of Appeals represents a big win for private schools in Maryland, Virginia, West Virginia, North Carolina, and South Carolina – and helps restore the status quo that had been in place for decades."

New Developments: West Coast

In San Luis Obispo, the defendant-school chose *not* to appeal to the Ninth Circuit, instead paying a modest settlement to end the case.

Although this Central District of California decision still stands, it is now merely an isolated trial-level ruling that goes against five decades of settled – and contrary – interpretation of Title IX in the federal courts around the nation.

And – significantly – in January 2024, an Arizona federal district judge issued a ruling rejecting the tax-exemption-as-Title-IX-trigger assertion that had been announced by the SLO judge in July 2022. See *Arizona Has Entered the Chat: Federal Court Rules That Non-Profit Schools Are Not Subject to*

Title IX (January 10, 2024) Brian Guerinot. Esq., & Kristin L. Smith, Esq., FisherPhillips LLP ["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."]

So, at best, in the Ninth Circuit, there is a split of authority between two federal districts. However, only one of the two West Coast decisions – the one from Arizona – is in line with the Fourth Circuit's excellent analysis and conclusion issued two months later. (In its March 27, 2024, reversal of the Baltimore trial court ruling, the unanimous Fourth Circuit panel had expressly addressed and criticized the reasoning and conclusion of the San Luis Obispo ruling in July 2022.

Is that It?

Now that both of these outlier judicial rulings from midsummer 2022 have been more or less marginalized, should private schools continue on, as before, assuming they are *not* subject to Title IX rules and restrictions?

Maybe not. There's a COVID-19-related twist – not widely known – that has separately triggered Title IX obligations for certain independent 501(c)(3) schools in the past few years.

As early as the first weeks of the pandemic, there had been warnings about a special concern arising from the widespread availability of emergency funding like the federal PPP loans. See *Schools Accepting COVID-19 Loans Must Be Aware Of Workplace Law Consequences* (April 5, 2020) Suzanne Bogden, Esq., et al., *FisherPhillips LLP*

"Many independent and private schools are contemplating applying for Paycheck Protection Program (PPP) and/or Economic Injury Disaster (EIDL) loans under the CARES Act," wrote Ms. Bogden. While the "… PPP loan program is certainly attractive, with loan forgiveness amounting to 'free money,' there may be a catch for independent and private schools accepting either type of loan."

After additional warnings in the first two years of the pandemic, Ms. Bogden offered additional grounds for concern about the effect on nonprofit schools of accepting PPP loans or other emergency funding. See *Federal Court Confirms that Schools Accepting PPP Loans Must Comply with Title IX* (July 13, 2022). Cape Fear Academy (Wilmington. N.C) was sued in federal court for sex discrimination and retaliation under Title IX "after three students alleged they were harassed by several classmates during the 2020-2021 school year." The school asked for a dismissal on grounds that it does not generally accept federal financial assistance. However, the school had applied for a $1.2 million PPP loan in April 2020 and received the money on May 4, 2020." None of the school's far-fetched arguments to wiggle out of Title IX liability based on the PPP loans succeeded.

One of the still-open questions about this emergency-funding trigger of Title IX is how long it lasts. In other words, what is the beginning date and the ending date for the Title IX jurisdiction? The general consensus seems to be that the activity giving rise to liability under Title IX must occur some time between that elusive start and end date.

Another question is what other type of emergency or temporary federal funding, if any, in the future may possibly trigger liability under Title IX or other federal provisions.

Conclusion

"Before July 2022, we all thought the law was fairly settled in this area," explain Fisher Phillips LLP attorneys Brian Guerinot and Kristin L. Smith in their post about the January 2024 Arizona trial-level decision. "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." (Of course, these comments by the Fisher Phillips specialists were made a few months *before* the Fourth Circuit's reversal of that Maryland decision. See later post, after the March 28, 2024, Fourth Circuit opinion.)

In the March 27, 2024, appellate ruling, Judge Thacker made a point of mentioning that there may be other cases floating around the U.S. court system now or in the near future continuing to test the theory that 501(c)(3) status alone triggers the restrictions of Title IX. (So, there likely are others that may soon ripen into litigation. Both sides, notably, were assisted during the Fourth Circuit appellate briefing rounds by heavyweight "friends.")

We'll have to wait and see what happens. Will the (apparently) restored status quo hold?

Or *should* it hold? In two recent law review articles, the authors present their aspirational views on how and why the law should change. See *An Expansive View of "Federal Financial Assistance* (February 26, 2024) Shariful Khan, *Yale Law Journal*; and *Title IX Taking on Tax-Exempt Schools* (April 15, 2024) Claire Zingraf Vaillancourt, *indianalawreview.com.*

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