ISSUES FOR PRIVATE COLLEGES:
1. What is a Private College?
2. What Rules Must It Follow?
3. What Are the Implications of Private Status on Employment Issues?

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WHAT IS A PRIVATE COLLEGE

INTRODUCTION

The debate over the legality of single-gender higher education continued to rage through 1995. The United States Supreme Court granted certiorari in the case of the United States v. Commonwealth of Virginia, Nos. 94-1941 and 94-2107 (the "VMI" case).

In this round, however, the distinction between public and private education has been raised explicitly. Supporters of the Virginia Military Institute have argued in their legal briefs and in the public press that if the Supreme Court were to conclude that VMI's all-male public military program violates the Equal Protection Clause of the U.S. Constitution, such a decision "could mark the beginning of the end of all public and private single-sex higher education." Anita K. Blair, "Separate and Equal," New York Times, Nov. 20, 1995.

This argument reveals a fundamental misunderstanding about the nature of private colleges and the rules that govern their activities. It suggests that public and private institutions are subject to the same Constitutional requirements and statutory law. Fortunately, the argument is wrong. It is important that private colleges understand why.

I. The Fourteenth Amendment Does Not Apply to Private Colleges.

A. It has long been clear that the Equal Protection Clause of the Fourteenth Amendment "erects no shield against merely private conduct" and inhibits "only such action as may fairly be said to be that of the States." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

B. In applying the Fourteenth Amendment to educational institutions, the relevant inquiry is (1) is the institution private and (2) can the action taken by the institution, even if private, be fairly attributable to the state. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

II. When Is a College Considered to Be Private?

A. The factors that determine whether an institution is public or private have been well-settled since the case of Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). There the Court held that the test of a college’s status depended upon its
charter. Since Dartmouth College was founded by a private citizen, funded through a private endowment, and governed by a privately appointed board of trustees, the school was considered to be private.

B. These features - origin, sources of financial support, and governing structure remain the hallmarks of private colleges today.

C. There are many examples of cases setting forth the standards for determining whether a college is private. For example:

Rendell-Baker v. Kohn, 457 U.S. 830, 831-32 (1982) (school was founded as a private institution, incorporated as a nonprofit entity, located on private property, and governed by a private board of directors who were not selected by public officials);

Board of Trustees for Vincennes Univ. v. Indiana, 55 U.S. (14 How.) 268, 276-77 (1852) (college that was governed by a privately appointed board of trustees was not a public institution, subject to the state's control, even though it was located on land donated by Congress to be held in trust by the State for the creation of an educational institution);

Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 352, 357 (7th Cir. 1986) (university was founded by religious order, incorporated as a nonprofit entity, and governed by a president and private board of trustees, a specified number of whom were required to be members of the founding order) (Posner, C.J., concurring);

Braden v. University of Pittsburgh, 552 F.2d 948, 959-61 (3d Cir. 1977) (former private university was transformed into "state-related institution" as a result of legislative "'comprehensive restructuring'" of the university that granted elected officials the power to appoint trustees and name certain public officials as ex officio trustees, gave the state widespread regulatory control over all fiscal matters and management, and dedicated public monies to support the university).
III. When Is the Action of a Private College Fairly Attributable to the State?

A. Determination that an institution is private may not shield it from application of the Constitutional requirements of the Fourteenth Amendment. The question is whether the private institution has engaged in "state action."

B. The test for state action is whether the state "has exercised coercive power or has provided such significant encouragement, either overt or covert" over the action of the institution. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

C. Various tests have emerged for determining "state action."
   2. Close nexus test. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974) (state action was not established by state regulation of public utility since regulation was unrelated to employee termination); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (state action was not established where the state and local regulation of the private high school was not related to teacher’s dismissal).

D. Courts are clear, however, that in the context of private colleges, state action should be carefully applied so as not to interfere with the "autonomy and diversity of private colleges and universities." *Berrios v. Inter American Univ.*, 535 F.2d 1330, 1333 (1st Cir. 1976).

IV. Cases Involving Private Higher Education: Avoid a Broad Interpretation of State Action.

A. Courts have consistently followed *Dartmouth College*’s holding that the registration, certification, or incorporation of the private entity by the State does not transform
the private entity into a state actor. See, e.g., McKeesport Hosp. v. Accreditation Council, 24 F.3d 519, 527 (3d Cir. 1994); Yeager v. City of McGregor, 980 F.2d 337, 342 n.9 (5th Cir.), cert. denied, 114 S. Ct. 79 (1993); Cohen v. Illinois Inst. of Technology, 524 F.2d 818, 824 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Blouin v. Loyola Univ., 506 F.2d 20, 21-22 (5th Cir. 1975); Blackburn v. Fisk Univ., 443 F.2d 121, 123 (6th Cir. 1971); Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968).

B. They have also uniformly held that the "mere offering of an education, regulated by the State," does not imbue private action with sufficient public interest to render it governmental in nature. Krohn v. Harvard Law School, 552 F.2d 21, 24 (1st Cir. 1977). In Rendell-Baker, 457 U.S. at 842, for example, legislation that guaranteed public funding to educate maladjusted high school students did not make such specialized education "the exclusive province of the State." See also Inter American Univ., 535 F.2d at 1333 ("[h]igher education is not generally regarded as exclusively a function 'traditionally associated with sovereignty'"); Fisk Univ., 443 F.2d at 124 (same); Ben-Yonatan v. Concordia College Corp., 863 F. Supp. 983, 987 (D. Minn. 1994) (same).

C. Courts have, in addition, found that considerable regulation by the State does not compel application of the Equal Protection Clause to private educational institutions. The private school at issue in Rendell-Baker for example, was subject to substantial regulation by a number of public entities, including local school committees, the State Drug Rehabilitation Division and other state agencies. Similarly, the university in Inter American University was subject to regulations of the state accrediting council as well as other regulations applicable to institutions of higher education. The mere regulation of these entities by public bodies, however, was "not sufficient" to render the institutions state actors. Rendell-Baker, 457 U.S. at 842; Inter American Univ., 535 F.2d at 1332. See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Cohen, 524 F.2d at 826; Powe, 407 F.2d at 81; Stone v. Dartmouth College, 682 F. Supp. 106, 108 (D.N.H. 1988); Blum, 457 U.S. at 1011.
D. Finally, Courts have routinely held that institutions that enjoy tax-exempt status or receive public money in the form of loan guarantees, scholarships, or grants, are not by virtue of their receipt of these public funds, transformed into state actors.

1. **Tax-exempt Status:** *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 859 (2d Cir. 1975) (tax exemption "creates only a minimal and remote involvement" by the government in the exempt entity's activities) (citations omitted); *Browns v. Mitchell*, 409 F.2d 593, 595-96 (10th Cir. 1969) (tax exempt status does not render institution a state actor); *Fischer v. Driscoll*, 546, F. Supp. 861, 865 (E.D. Pa. 1982) (same).

2. **Student aid, Grants, Loans:** *Inter American Univ.*, 535 F.2d at 1332 (university that participated in state student aid program was not found to be a state actor); *Loyola Univ.*, 506 F.2d at 21; (fact that private university received "substantial federal and state monies in the form of grants, subsidies, student scholarships, and loans" did not support a finding of state action); *Greenva v. George Washington Univ.*, 512 F.2d 556, 561 (D.C. Cir.) ("direct grants, loans, or loan guarantees" were not sufficient to establish state action by otherwise private university), cert. denied, 423 U.S. 995 (1975).


4. **Substantial Public Funds:** Indeed, even where the public funds received by the private entity are substantial, courts have declined to find state action. The private school's dismissal of teachers without due process in *Rendell-Baker*, for example, did not constitute state action in spite of the fact that the school received "virtually all of [its] income" from various state agencies. *Rendell-Baker*, 457 U.S. at 840. Similarly, the
university’s conduct in *Imperiale v. Hahnemann University*, 776 F. Supp. 189, 198 & n.4 (E.D. Pa. 1991), *aff’d*, 966 F.2d 125 (3d Cir. 1992), did not constitute state action even though the university received "substantial infusions of state funds" which were "clearly of great importance to it."

E. In short, it is clear that the mere receipt of government grants, loans or funding "is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 548 (S.D.N.Y. 1968).

F. *Norwood v. Harrison*, 413 U.S. 455 (1973), had a different result. In *Norwood*, this Court found that the state’s financial aid in the form of the provision of textbooks to private elementary and secondary schools that discriminated on the basis of race constituted state action. A canvas of the state action cases since *Norwood*, however, indicates that the Court’s broad reading of the state action doctrine in that case has been limited to circumstances in which the challenged action involves invidious racial discrimination. As one court noted, "'racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts.'" *Greenya v. George Washington Univ.*, 512 F.2d 556, 560 (D.C. Cir. 1975) (finding that federal funding for a private university’s programs and capital expenditures did not constitute state action where the challenged action was the termination of employment of an instructor without due process and in violation of his First Amendment rights).

V. Private College’s Tax-Exempt Status Does Not Subject Them to Constitutional Scrutiny.

A. As the cases above demonstrate, tax-exempt status does not make a private institution a state actor. Similarly, a college’s tax-exempt status is not threatened by policies that might be "unconstitutional" if applied to a public institution -- except in the context of race discrimination.
B. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court affirmed the Internal Revenue Service’s denial of tax-exempt status to two private colleges that maintained racially discriminatory enrollment policies. The Court’s analysis there began with the determination that Congress, in enacting the Internal Revenue Code, intended that tax-exempt institutions must, in addition to fitting into one of the categories enumerated in the relevant Code provisions, "serve a public purpose and not be contrary to established public policy." *Id.* at 586. This Court then found that racial discrimination in education violates "a most fundamental national public policy." *Id.* at 593. Private colleges that practice racial discrimination cannot, it followed, enjoy tax-exempt status.


D. That the *Bob Jones* public policy requirement has fostered limited change in the status of tax exempt organizations is not surprising in light of the constraints on the requirement set forth in the opinion. This Court warned that the determination of public policy is a "sensitive matter[] with serious implications for the institutions affected" and repeatedly cautioned that a declaration that a private institution contravenes public policy should be made "only where there is no doubt that the organization’s activities violate fundamental public policy." *Bob Jones*, 461 U.S. at 592, 598.

E. Finally, the Court clearly set forth the basis for its determination that racial discrimination by educational institutions violates public policy; "unmistakably clear" concordance between "all three branches of the Federal Government" that racial discrimination
must be eradicated, manifested by an "unbroken line" of cases and "myriad Acts of Congress and Executive Orders" spanning over a quarter-century.

CONCLUSION

Public colleges and universities are subject to constitutional requirements not imposed upon private institutions. In particular, due process and equal protection law applies only to public schools. This distinction is critical in the analysis of single-gender education. It is also of great significance in analyzing the general obligations of private colleges with respect to employment, admissions, and other aspects of college life.
WHAT RULES GOVERN PRIVATE COLLEGES

INTRODUCTION

There is often considerable confusion as to what rules govern private -- as opposed to public -- colleges and universities. It is useful to have the differences in mind in determining a private college’s obligations.

I. Due Process and Equal Protection Do Not Apply.

A. As discussed in Part I -- What Is a Private College -- the Fourteenth Amendment requirements of due process and equal protection apply only to public institutions.

B. This means that private colleges cannot be sued for violations of these public requirements. In other words, a faculty member cannot claim that a denial of tenure violated his or her due process rights.

II. FOIA Does Not Apply.

A. The Freedom of Information Act, 5 U.S.C. 552, applies to agencies of the federal government. There are also state FOIA’s - but they, similarly, apply to public agencies.

B. In short, contrary to what many people seem to believe, private colleges are not subject to FOIA requirements. The applicable rules governing the institution’s disclosure obligations must be found elsewhere.

III. The Governing Rules.

A. The fact that the Fourteenth Amendment and FOIA do not apply to private colleges does not mean that these institutions are free from requirements with respect to discrimination, disclosure, and so on. The source of these obligations, however, is different.
B. Congress has enacted numerous statutes prohibiting discrimination by private institutions, including colleges and universities -- such as, Title VII (prohibiting discrimination on the basis of race and sex in employment); the Americans with Disabilities Act (prohibiting discrimination in employment, admissions, and programs on the basis of a disability); Title IX (prohibiting discrimination in education on the basis of sex); the Age Discrimination Act (prohibiting discrimination on the basis of age); and Title VI (prohibiting discrimination in education on the basis of race). States have also enacted similar human rights laws governing private institutions. In short, one major source of the governing rules for private colleges is statutory law.

C. The other principal source of legal obligations imposed on private colleges is based on the "common law." In particular, private colleges are subject to the law of contracts and the law of torts.

1. Contract law provides the obligation of the college to abide by written, and sometimes oral, communications between the institution and the faculty, students, and staff. Most often, the contract obligations of the college are found in the handbook and/or personnel manual.

2. Tort law provides the obligation of the college to act reasonably to protect the health and safety of the community. These obligations include anything from preventing students and employees from slipping on icy sidewalks to protecting students and employees from sexual assault.

CONCLUSION

Private colleges look to the common law of contracts and tort and state and federal legislation for their legal obligations. While these governing rules may be comparable to the obligations imposed by the constitution on public institutions -- they are not the same.
THE IMPLICATIONS OF PRIVATE STATUS ON EMPLOYMENT ISSUES

INTRODUCTION

Public and private institutions have significant legal obligations with respect to employment of faculty and staff. The obligations are not identical. Two examples are worth exploring to make this point. First, the rights of employees in termination cases depend upon the public/private status of the institution. Second, disclosure obligations in tenure disputes may depend upon the status of the college.

I. The Termination of Employees in Private Colleges.

A. In public institutions, an employee may not be terminated without enjoying the protections of the due process of law. In other words, regardless of the rules and regulations adopted by the institution, no public employee may be terminated without due process -- or fair procedures.

B. Private employers are not subject to due process standards. Consequently, employees may be terminated as the college chooses -- subject, of course, to federal and state discrimination laws. This is known as "employment at will."

C. Over the years the courts have made significant modifications of the "employment at will" doctrine. Relying on employee handbooks and manuals, in particular, a majority of courts have ruled that the standards set forth in these policy handbooks constitute "contracts" which must be followed by the employer. The handbooks often provide for procedures that must be followed prior to termination. They also may provide grounds for termination. In jurisdictions where these manuals are considered binding, a college may be subject to liability for failing to abide by the rules and policies promulgated by the institution and provided to the employee.

I. The following cases find that a handbook may create contractual obligations: Small v. Springs Indus., Inc., 300 S.C. 481, 388 S.E.2d 808 (1990); Thompson v. Kings Entertainment Co., 674 F. Supp. 1194 (E.D. Va. 1987); Woolley v. Hoffmann-La

D. In some jurisdictions, courts have rejected this approach and find that the manuals are not binding on the college.


E. Some jurisdictions that have limited the employment at will doctrine have done so quite narrowly. In New York, for example, if there is an explicit reference in an employment contract that provides that employment is "at will," then no suggestion in the handbook to the contrary creates any contract rights. Monsanto v. Electronic Data Sys. Corp., 141 A.D.2d 514, 529 N.Y.S.2d 512 (1988). Further, the employee must be able to show that he or she relied on the provisions in the handbook in accepting a job offer in order to later sue for breach of contract based on the handbook. Weiner v. McGraw Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982).

F. In addition to a breach of contract theory, some courts have implied a

G. In short, private colleges need to look at their own state law to determine whether, and the extent to which, they have specific contract and/or tort liabilities with respect to the termination of employees.

H. Some helpful resources for ascertaining these obligations include:


II. Confidentiality of Tenure Materials.

A. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court settled the issue as to whether a plaintiff, challenging a tenure denial on the basis of discrimination, is entitled to review confidential evaluations in his or her tenure file. The Supreme Court ruled that peer review materials, whether or not treated as confidential by the institution, had to be disclosed in the course of an EEOC investigation. In so ruling, the Court rejected the university’s claim of a common-law privilege against disclosure of
confidential peer review materials and its claim that disclosure would violate academic freedom.

B. While the University of Pennsylvania case appears to resolve the question as to whether plaintiffs in Title VII cases may have access to their tenure files, it leaves open the question as to whether such disclosure is required when discrimination is not an issue.

C. Disclosure of these materials may be required of public institutions pursuant to state public record statutes. See, e.g., Sprague v. University of Vermont, 661 F. Supp. 1132 (D. Vt. 1987) (holding the University of Vermont subject to the state’s Open Meeting Law and Public Records Law and requiring disclosure of student evaluations).

D. Disclosure of tenure reports of private colleges may also be required by statute. See, e.g., Lafayette College v. Dept. of Labor, 118 Pa. Commw. 11, 546 A.2d 126 (1988) (faculty member who was denied tenure was entitled to review performance evaluations pursuant to Pennsylvania Personnel Files Act).

E. In the absence of a statute such as the Pennsylvania statute, it is not clear whether confidential tenure material must be disclosed in a tenure dispute in a private college where discrimination is not at issue. Whether disclosure is required may depend upon the provisions of the faculty handbook or other such policy statements of the institution. It is also possible that an argument could be made under the University of Pennsylvania case that the tenure file is disclosable during the course of discovery since the college has no special common law right to withhold it and no legitimate academic freedom defense.

CONCLUSION

This is just another example of the implication of an institution’s public vs. private status in evaluating its obligations under the law.

The important point is that private institutions should recognize the source of its legal obligations so that it can satisfy those obligations and avoid litigation to the greatest extent possible.
This means that, in addition to understanding the state and federal statutory requirements applicable to private institutions, private colleges should periodically review their policy statements and handbooks to make sure that they (1) are clear; (2) set forth procedures that the college actually follows; (3) do not create rights the college does not intend to bestow; and (4) do not conflict with discrimination or other statutes.