

**CAROLYN A. QUATTROCKI**  
*Chief Deputy Attorney General*

**LEONARD J. HOWIE III**  
*Deputy Attorney General*

**CARRIE J. WILLIAMS**  
*Deputy Attorney General*

**SHARON S. MERRIWEATHER**  
*Deputy Attorney General*

**ZENITA WICKHAM HURLEY**  
*Deputy Attorney General*



**STATE OF MARYLAND**  
**OFFICE OF THE ATTORNEY GENERAL**  
**OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY**

**ANTHONY G. BROWN**  
*Attorney General*

**SANDRA BENSON BRANTLEY**  
*Principal Counsel*

**DAVID W. STAMPER**  
*Deputy Principal Counsel*

**PETER V. BERNS**  
*General Counsel*

**CHRISTIAN E. BARRERA**  
*Chief of Staff*

**NATALIE R. BILBROUGH**  
*Assistant Attorney General*

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The Honorable Sara Love  
Maryland Senate  
222 James Senate Office Building  
Annapolis, Maryland 21401  
*Via email*

**RE: *Discrimination Complaints to Private Schools***

Dear Senator Love:

You have asked whether the General Assembly has jurisdiction to:

1. Require private schools to report to the State how many discrimination complaints they receive;
2. Require private schools to not share a student's personal information; and
3. Create a commission to look into discrimination complaints against private schools in Maryland.

In short, I think the answer is "yes" to all three questions. It is well established that the General Assembly has plenary power to enact any law for any purpose of civil government subject only to the limitations of the State and federal constitutions. *Richards Furniture Corp. v. Board of Cty. Commissioners*, 233 Md. 249, 257 (1963); *Maryland Committee v. Tawes*, 228 Md. 412, 439 (1962). The United States Supreme Court has repeatedly acknowledged "the power of the state reasonably to regulate *all* schools, to inspect, supervise and examine them, their teachers and pupils; ... and that nothing be taught which is manifestly inimical to the public welfare." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (emphasis added). Although the reporting requirement might implicate constitutional free speech concerns, I think such a requirement could be constitutional. I provide more detail on my conclusions below. Before providing a more definitive or detailed constitutional analysis, however, I would need to see the language of a legislative proposal.

### ***Private Schools Background***

In Maryland, private schools<sup>1</sup> fall into three categories: (1) nonpublic schools approved under COMAR 13A.09.09 (private pay); (2) nonpublic schools approved under COMAR 13A.09.10 (publicly funded);<sup>2</sup> and (3) registered church-exempt schools.<sup>3</sup> The first two types of schools must hold a Certificate of Approval issued by the Maryland State Board of Education (“State Board”), and must continuously comply with State standards and regulations to maintain their certification. Md. Code Ann., Educ. Art. (“ED”), § 2-206(e)(1).

The third category, church-exempt private schools, are those that are governed and operated by a “*bona fide* church organization.” They do not need a Certificate of Approval, and they are not required to meet the educational standards that have been established by the State Board for nonpublic schools. ED § 2-206(e)(4). Church-exempt schools must register their operation with the Nonpublic School Approval Branch of the Maryland State Department of Education.<sup>4</sup> Church-exempt schools that do not have a Certificate of Approval from the State Board may not receive State funds, other than for eligible students in the food service program. ED § 2-206(e)(4). However, church-exempt private schools, as well as the other nonpublic schools, are *not* exempt from other applicable local, State, and/or Federal approval or licensure requirements such as zoning ordinances, health department regulations, fire safety regulations, asbestos regulations, criminal background checks, child abuse and neglect reporting law, and childcare licensing requirements.

Unlike public schools, private schools (especially church-exempt private schools) that do not receive government funding are allowed, in certain instances, to discriminate in admissions or employment on certain bases, including religion, sex, disability, and sexual orientation. Private schools that do not receive federal funding are not subject to federal non-discrimination requirements for education, *e.g.*, Title VI (race, color, national origin), Title IX (sex), and § 504 of the Rehabilitation Act of 1973 (disability).<sup>5</sup> And the First Amendment’s Religion Clauses prevent the government from interfering with the operation and employment decisions of faith

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<sup>1</sup> As used in this letter, “private schools” or “nonpublic schools” refers to nonpublic elementary and secondary schools.

<sup>2</sup> These are entities operating certain defined “educational programs” in a “facility licensed by a unit of State government to provide treatment or care” and to “educational programs that provide special education to children placed in a nonpublic school in accordance with Education Article, § 8-406.” COMAR 13A.09.10.01.

<sup>3</sup> <https://marylandpublicschools.org/about/Pages/DEE/NPSA/index.aspx>.

<sup>4</sup> [https://marylandpublicschools.org/about/Pages/DEE/NPSA/Church\\_Exempt\\_Schools\\_Information.aspx](https://marylandpublicschools.org/about/Pages/DEE/NPSA/Church_Exempt_Schools_Information.aspx).

<sup>5</sup> Private schools that are not owned or run by religious institutions are subject to the Americans with Disabilities Act.

institutions.<sup>6</sup> However, federal law, 42 U.S.C. § 1981,<sup>7</sup> prohibits private schools from discriminating on the basis of race. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (holding that private secular schools that excluded students based on race violated § 1981). In addition, the IRS requires private schools to adopt racially nondiscriminatory policies to receive and maintain 501(c)(3) nonprofit status.

Moreover, since 2022, State law provides that nonpublic schools *that receive State funds* may not, on the basis of race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability:

- (1) “Discriminate against a current student, a prospective student, or the parent or guardian of a current or prospective student”; or
- (2) “Refuse enrollment of a prospective student, expel a current student, or withhold privileges from a current student, a prospective student, or the parent or guardian of a current or prospective student.”

ED § 26-704. Nor may such a school discipline or retaliate against a student or parent or guardian who files a discrimination complaint. *Id.* Notably, these State nondiscrimination provisions expressly do not apply in certain scenarios; for example, they would not prevent a single-sex school from discriminating on the basis of sex, or religiously-affiliated schools from discriminating on the basis of religion. *See* ED § 26-702 (defining scope of subtitle 7); *see also* ED § 26-703 (clarifying that subtitle 7 does not require religiously affiliated private schools to do certain things that conflict with the school’s religious or moral teachings as long as the action or policy is not based on prohibited discrimination). State law also prevents private schools from receiving the necessary State Board approval if they discriminate based on race, color, or national origin. ED § 2-206(e)(3)(i).

### ***Discrimination Complaint Reporting***

First, you asked whether the General Assembly can require private schools, even those that do not receive State funding, to report to the State the number of discrimination complaints they receive.

Private schools that are not church-exempt must already provide some discrimination-related reporting. State law already requires public and nonpublic schools (“noncollegiate educational institutions”) to “[f]urnish the reports and information required by the State

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<sup>6</sup> For example, in the employment context, the U.S. Supreme Court has held that the First Amendment allows religious schools to discriminate in hiring and firing at least certain employees on religious grounds. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012) (holding that a “minister’s” employment discrimination claims under federal civil rights laws, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, are barred by the “ministerial exception”); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (ministerial exception applies to any employee that advances a religious institution’s mission).

<sup>7</sup> 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts.

Superintendent on the forms provided by the State Superintendent.” ED § 2-206(j). State regulation provides that a chief officer of the legal authority of a nonpublic school must “certify on the form provided by the Department that it does not practice discrimination based upon race, color, or national origin as specified in Education Article, § 2-206(e)(3).” COMAR 13A.09.09.04H. *See also* ED § 2-206(e)(3)(i) (prohibiting State Board from approving “an institution that [p]ractices discrimination based on race, color, or national origin”). The State Superintendent also receives discrimination complaints pursuant to ED § 26-705.

In my view, the General Assembly could expand what information needs to be reported by regulated private schools by requiring the schools to report to the State how many discrimination complaints they receive. This requirement might implicate the First Amendment’s Free Speech Clause because the First Amendment protects the right to *not* speak. Courts have not yet settled on which level of scrutiny (strict, intermediate, or lower “rational basis-like” scrutiny) applies to such requirements. Government reporting requirements are common at the federal and state levels, and in some cases, courts have rejected that such reporting requirements are compelled speech at all.<sup>8</sup> In other cases involving disclosure requirements in commercial speech or government reporting mandates where the compelled disclosure is “purely factual and uncontroversial” rather than ideological or political, courts generally apply a lower level of scrutiny, asking only whether the requirement is “unjustified or unduly burdensome” and “reasonably related” to the government’s interests.<sup>9</sup> *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985) (upholding disclosure requirements for attorney solicitations).

A mandate that a private school must report factual data — the mere number of complaints — rather than a particular message or view, would likely not violate the First Amendment’s free speech protections against compelled speech. The law will be more defensible if the legislative record shows that the reporting requirement is at least reasonably related to ensuring that the school does not impermissibly engage in prohibited discrimination. *See, e.g., Bob Jones Univ. v. United States*, 639 F.2d 147, 153 (4th Cir. 1980), *aff’d*, 461 U.S. 574 (1983) (“The government interest in eliminating all forms of racial discrimination in education is compelling.”)<sup>10</sup> Any such legal

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<sup>8</sup> *See, e.g., Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988) (implying that a state requirement that fundraisers to disclose certain financial information to the state is not compelled speech and is constitutional); *United States v. Sindel*, 53 F.3d 874, 875 (8th Cir. 1995) (holding that IRS Form 8300, which requires taxpayers to report information related to cash transactions, including “the name, address, tax identification number, and other information about each payor and each person on whose behalf payment is made,” is not compelled speech); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (“The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken.”); *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108-09 (D.C. Cir. 2011) (rejecting argument that an SEC regulation requiring institutional investment managers to report quarterly to the SEC “the names, shares, and fair market value of the securities” over which the managers exercise control was compelled speech).

<sup>9</sup> *See, e.g., Pharm. Rsch. & Manufacturers of Am. v. Stolfl*, No. 24-1570, 2025 WL 2448851, at \*7-\*13 (9th Cir. Aug. 26, 2025) (discussing the merits of various approaches and the need for a standard for evaluating government reporting requirements).

<sup>10</sup> A requirement to provide a different type of information, such as an analysis of a discriminatory complaint or other potentially controversial information, could perhaps raise more serious First Amendment concerns.

requirement would also be more defensible if it specifies what type of discrimination complaints must be reported — e.g., by whom, on what basis, only those submitted via the ED § 26-705 process, etc. — to avoid having schools have to make subjective or ideologically-laden decisions on what to report.

Note, the school nondiscrimination provisions in State law do not apply to private schools that do *not* receive State funds (which could be religious or secular), and the State Board certification requirement does “not apply to an institution operated by a *bona fide* church organization.” ED § 2-206(e)(4). Thus, church-exempt private schools are not currently required to certify that they do not discriminate based on race, color, or national origin. The General Assembly could, however, in my view, still require church-exempt private schools and secular private schools that do not receive State funds (and thus are not subject to the school antidiscrimination provisions in State law) to report the number of discrimination complaints they receive. Because these two sub-categories of private schools are not subject to some anti-discrimination laws, a potential reporting requirement would have to make it clear what types of discrimination the schools should be reporting on and for what purpose, since they are not subject to many antidiscrimination requirements.

### ***Student Information Privacy***

Second, you asked whether the General Assembly can require private schools to not share a student’s personal information. As stated above, the General Assembly has broad authority to enact laws for the general welfare, and in general, private schools must comply with State law requirements related to health and safety, and other requirements described in the Maryland State Board of Education’s regulations. The General Assembly’s authority extends to the power to enact a law to protect student privacy by requiring private schools to not share a student’s personal information with third parties, as long as that requirement does not conflict with federal law. Other states have enacted laws restricting private schools’ ability to share student’s personal information. *E.g.*, The Student Online Personal Protection Act, § 26, 105 Ill. Comp. Stat. Ann. 85/26. Without seeing the language of a legislative proposal, however, I cannot evaluate further whether there would be any constitutional issues.

**What the law already covers:** The Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, 34 CFR Part 99, requires student information to be shared only with parental consent, subject to certain exceptions; however, FERPA does not apply to most private elementary and secondary schools because they typically do not receive federal funding. *See* 34 CFR § 99.1. Similarly, the privacy protections applicable to student personal information provided under the Maryland Public Information Act apply only to “public records,” which do not cover records created by private schools. Md. Code Ann., Gen. Prov. Art. § 4-101(k)(1); *id.* § 4-304. In addition, State regulations already require *publicly funded* nonpublic schools to develop written policies and procedures to protect student privacy, including “[a] policy statement assuring that the school may not disclose personally identifiable information from a student’s record without prior written consent of the student’s parent unless otherwise allowed by law.” COMAR 13A.09.10.12B(2)(c).

### ***Commission Creation***

Last, you asked whether the General Assembly can create a commission to investigate discrimination complaints against private schools. The answer is yes. The General Assembly can and has created State entities to investigate civil violations of law, for example, the Maryland Commission on Civil Rights. Note that the commission’s use of its authority would be subject to constitutional limitations. For example, it could not interfere with the operation of, or the religious teachings provided by, a church-exempt school.

**Current authority:** The State Superintendent of Schools is already authorized to receive complaints of discrimination in nonpublic schools that receive State funds, and to facilitate mediations and issue decisions related to such complaints. ED § 26-705.

The Maryland Office of the Inspector General for Education is also “responsible for examining and investigating . . . complaints or information concerning . . . [v]iolations of civil rights, as defined in federal or State laws, of students or employees of [nonpublic schools that receive State funds]”, as well as “compliance with other applicable federal and State laws.” ED § 9.10-104(a-b). Where the Inspector General identifies an issue of concern that would not constitute a criminal violation of State law, the Inspector General may report the issue to the State Superintendent, the State Board of Education, the Interagency Commission on School Construction, the Governor, and, in accordance with State Government Article § 2-1257, the General Assembly.

In addition, the Office of the Attorney General’s Civil Rights Division has the authority to investigate any civil rights violations by non-government organizations — this includes violations of both State and federal civil rights laws in education by private schools — to the extent those laws apply. The Civil Rights Division focuses on broad patterns of discrimination, not just single cases. For private schools receiving federal funding, the Office of Civil Rights in the U.S. Department of Education, can investigate discrimination complaints to ensure schools comply with Title VI and other federal non-discrimination law.

Still, the General Assembly could, if it wished, provide for a separate commission to investigate discrimination complaints against private schools. I cannot provide further analysis of the legality without a specific proposal and language.

I hope this information is helpful. Please let me know if you have any other questions.

Sincerely,



Natalie R. Bilbrough  
Assistant Attorney General