



HUMAN
RIGHTS
CAMPAIGN®

May 6, 2016

Chancellor Carol Folt
UNC-Chapel Hill
103 South Building, Campus Box 9100
Office of the Chancellor
Chapel Hill, NC 27599

RE: Compliance with the Department of Justice's Letter Regarding HB 2

Dear Chancellor Carol Folt,

On behalf of the Human Rights Campaign's more than 1.5 million members and supporters nationwide, I write in regards to the letter sent by the Department of Justice informing Margaret Spellings, President of the University of North Carolina University System, Thomas Shanahan, Senior Vice President and General Counsel, and the UNC Board of Governors that by complying with HB 2, the University of North Carolina is in direct violation of federal law. This letter specifically provides that the state is engaging in a pattern or practice of discrimination against transgender state employees in violation of Title VII of the Civil Rights Act of 1964 and students under Title IX of the Education Amendments of 1972. Tens of thousands of students, faculty, and university employees across North Carolina have been harmed by HB2. The Department of Justice has now affirmed HB2 violates the civil rights of those in the academic community, and we therefore urge you to reverse its implementation and advocate broader state compliance as well. This is not only the right thing to do, it is the law.

Title IX Prohibits Discrimination on the Basis of Gender Identity

Title IX prohibits sex discrimination in any educational program or activity that receives federal funding – including public primary and secondary schools, public colleges and universities, and private schools and universities that accept student loans or other federal funds. Although best known for its impact on girls' and women's athletic programs, Title IX protects students from discrimination in a broad array of areas of education including admissions, housing, recruitment, athletics, facilities, financial assistance, and counseling services.

Title IX's non-discrimination protections on the basis of sex include gender identity. This is now a well-settled interpretation of the law that has been embraced by the Department of Education

and federal courts – most recently, and notably in the Fourth Circuit Court of Appeals in *G.G. v. Gloucester County School Board*. Both the Department of Education and the Department of Justice have weighed in to clarify that educational institutions should interpret Title IX to include gender identity based on the legal theory of sex stereotyping. The Departments of Education and Justice have adopted this legal reasoning in their respective interpretations of Title IX. The Department of Education, through a series of “Dear Colleague” letters and guidance documents, have provided educational institutions with clarification that Title IX prohibits gender-based harassment of students, including harassment by a person of the same sex, harassment for “failing to conform to stereotypical notions of masculinity or femininity”, discrimination against transgender and gender non-conforming students, and failure to respect transgender students’ gender identity when operating single-sex classes.

Similarly, the Department of Justice has previously relied on seminal Title VII case law interpreting sex discrimination to include sex stereotyping in its explanation that “[t]reating a student adversely because the sex assigned to him at birth does not match his gender identity is literally discrimination ‘on the basis of sex.’” The Justice Department has participated in an array of lawsuits to ensure that LGBT students’ Title IX rights are enforced. Forbidding transgender students appropriate access to bathrooms, specifically, is discrimination on the basis of gender identity and, therefore, sex as prohibited by Title IX. In addition to the materials formally released by the Department of Education stating its position that discrimination on the basis of sex includes discrimination on the basis of gender identity, several enforcement actions have been taken against schools against schools that discriminate against transgender students by denying them access to the bathroom consistent with the students’ gender identity. Two of these issues were settled during the course of administrative enforcement actions and a third resulted in a resounding affirmation of this policy in the 4th Circuit Court of Appeals.

- *Student v. Arcadia Unified School District* (2013): A complaint was filed with the U.S. Department of Education’s Office for Civil Rights and the U.S. Department of Justice’s Civil Rights Division after a school district refused to allow a transgender student access to bathroom and locker room facilities that accord with his gender identity, requiring him instead to use the nurse’s office for restroom access and changing for gym class. He was also prevented from staying in overnight accommodations with other male students as part of a school-sponsored trip. The school district agreed to a settlement that required the school district to implement school and district-wide measures, including updated policies and procedures, to ensure that transgender and gender nonconforming students have equal access to all school programs, facilities, and activities.⁷³ This case makes it clear that Title IX prohibits educational institutions from forbidding students bathroom access in accordance with their gender identity.⁷⁴

⁷³ See, e.g., *Department of Justice Case Summaries*, available at <http://www.justice.gov/crt/case-summaries> (last visited Nov. 18, 2015) for other agreements.

⁷⁴ *Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for*

- *Student v. Township High School District 211* (2015): A complaint was filed with the Department of Education’s Office for Civil Rights after a student was denied equal access to a school locker room when she was forced to use a separate bathroom for changing. The school agreed to a settlement in which it committed to grant the student equal access to all district programs and activities without discrimination based on gender identity, including equal access to locker rooms. This case makes it clear that Title IX prohibits educational institutions from forbidding students locker room access in accordance with their gender identity.⁷⁵
- *G.G v. Gloucester County School Board*: As discussed above, the Fourth Circuit determined that Title IX protects the rights of transgender students to participate in school in accordance with their gender identity.

Title VII Prohibits Discrimination on the Basis of Gender Identity and Sex Stereotyping

The inclusion of gender identity discrimination as an unlawful type of sex discrimination is a direct outgrowth of sex stereotyping case law. Sex stereotyping was developed in the body of case law surrounding Title VII, which prohibits discrimination on the basis of sex, as well as other characteristics, in employment. Federal courts routinely rely on Title VII case law to interpret Title IX, and the sex stereotyping argument has thus transitioned into interpretations of Title IX as well.⁷⁶ Several notable cases have developed and solidified the line of reasoning that, fundamentally, discrimination on the basis of gender identity, sexual orientation, or sex stereotyping (assuming that a person of a particular sex will behave in a certain way because of their sex), is discrimination “on the basis of sex”.

In *Price Waterhouse v. Hopkins*, the Supreme Court unanimously held that Title VII did not permit an employer to evaluate female employees based upon their conformity with the employer’s stereotypical view of femininity.⁷⁷ While this case did not raise questions involving sexual orientation, the sex stereotyping reasoning utilized by the Court has proved pivotal for later claims involving sexual orientation and gender identity discrimination. In *Oncale v. Sundowner Offshore Services*, the Supreme Court determined that an employer could be held liable under Title VII for failing to stop sexual harassment involving employees of the same gender.⁷⁸ Lower courts have also contributed to the body of law on discrimination against LGBT employees. To date, two federal circuit courts have ruled that Title VII could apply to a claim

Civil Rights, and the U.S. Department of Justice, Civil Rights Division.
<https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.

⁷⁵ *Agreement to Resolve Between Township High School District 211 and the U.S. Department of Education*, Office for Civil Rights OCR Case # 05-14-1055. <http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>.

⁷⁶ See *Jennings v. Univ. of N. Carolina*, 482 F.3d 686 (4th Cir. 2007). (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”) and *Preston v. U.S.*, 376 U.S. 364 (1964)(holding that the Title IX discrimination claim should be interpreted by principles governing Title VII).

⁷⁷ 490 U.S. 228 (1989).

⁷⁸ 523 U.S. 75 (1998).

brought by a transgender woman who alleged that she was fired based on her gender identity.⁷⁹ This line of reasoning was further extended in administrative decisions issued by the U.S. Equal Employment Opportunity Commission (EEOC). In 2012, the EEOC “recognized that a complaint of discrimination based on gender identity, change of sex, and/or transgender status was cognizable under Title VII.”⁸⁰

Non-Compliance Could Cost North Carolina Colleges and Universities Billions

Non-compliance with Title IX puts federal funding at risk; North Carolina education programs receive billions of dollars in federal funds. Title IX conditions federal funding on agreement by the recipient institution that it will not discriminate on the basis of sex; therefore, non-compliance with Title IX can result in suspension or termination of a recipient’s federal funding.⁸¹ When an institution is non-compliant, the Department of Education can take administrative action at the conclusion of which, if the institution is still non-compliant, the Department of Education can terminate all federal funding flowing to that institution, including funding that flows from other federal agencies. In addition to administrative remedies, individuals may bring a cause of action in federal court which, if discrimination has occurred, may result in an injunction or monetary damage or both.

In addition to penalties involving violation of Title IX, as North Carolina’s largest employer, continued compliance with HB 2 makes the University of North Carolina System vulnerable to credible and costly law suits on behalf of transgender and gender nonconforming workers. Continued defiance of these federal statutes in order to comply with HB 2 places your educational institution at severe legal and financial risk.

Sincerely,



Sarah Warbelow

Legal Director, Human Rights Campaign



Crystal Richardson, Esq

Director of Advocacy, Equality North Carolina

⁷⁹ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

⁸⁰ *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

⁸¹ 20 U.S.C. § 1682.