



March 22, 2016

Re: Transgender students, bathroom access, and educational institutions' obligations per Title IX

To Whom It May Concern:

I write to you as the Legal Director of the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual and transgender (LGBT) equality. On behalf of our more than 1.5 million members and supporters nationwide, including tens of thousands in North Carolina, I am writing you today to share some information you might find useful as you consider Bill 2015-RO-12A during the upcoming special session. We have significant concerns about many elements of this bill, and urge you to vigorously oppose it, but this memo addresses only the legal liability that North Carolina school districts would face if this bill were to pass.

If this legislation were to become law, it would put North Carolina school districts that complied with the law in direct violation of Title IX and would put an estimated \$4.5 billion of federal funding at risk. Furthermore, it would open school districts up to costly litigation and administrative actions brought by the United States Department of Education's Office of Civil Rights or the Department of Justice. This bill offers costly supposed solutions to non-existent problems, and it would force schools to choose between complying with federal law – plus doing the right thing for their students – and complying with a state law that violates students' civil rights.

Title IX of the Education Amendments of 1972 (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.¹ It is also clear as a matter of law that Title IX protects students on the basis of gender identity and sexual orientation, as well – as evidenced by recent case law, Department of Education guidance, and school district settlements which support the use of Title IX by LGBT students seeking recourse from discrimination.

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.² 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

¹ See generally 34 CFR Part 106, Subpart D.

² 20 U.S.C. § 1682



to that institution, including funding that flows from other federal agencies.³ 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.⁴

Title IX’s non-discrimination protections on the basis of sex include gender identity. 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. Sex stereotyping was developed in the body of case law surrounding Title VII of the Civil Rights Act of 1964, 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,⁵ and the sex stereotyping argument has thus transitioned into interpretations of Title IX as well.

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.⁶ 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.⁷ Subsequently, federal district and circuit courts have found that openly gay and lesbian employees can seek recourse under Title VII when they have been subjected to sexual harassment.⁸ 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

³ See generally *id.* at § 1682 and 34 C.F.R. § 106.

⁴ See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)(holding that a claim for damages can be brought against a school district under Title IX), *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (holding that a claim for damages can be brought against a school district under Title IX for failing to stop teacher-on-student harassment where the school district had actual notice and acted with deliberate indifference to the misconduct), *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding that a claim for damages can be brought against a school under Title IX for student-to-student harassment where the funding recipient acted with deliberate indifference to known acts of harassment).

⁵ 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).

⁶ 490 U.S. 228 (1989).

⁷ 523 U.S. 75 (1998).

⁸ See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (holding that an openly gay employee subjected to severe physical harassment of a sexual nature in the workplace may have a valid sex discrimination claim under Title VII.) See also *Nguyen v. Buchart-Horn, Inc.* 2003 U.S. Dist. LEXIS 12398 (E.D. La. July 15, 2003)(holding that the plaintiff was not barred from a sex discrimination claim under Title VII because of his sexual orientation.)



claim brought by a transgender woman who alleged that she was fired based on her gender identity.⁹ In addition, several district courts have determined that discrimination against gay and lesbian employees was a violation of Title VII because the employers relied upon gender-based stereotypes when making employment decisions¹⁰.

This line of reasoning was further extended in administrative decisions issued by the U.S. Equal Employment Opportunity Commission (EEOC).¹¹ 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.”¹² And in 2015, the EEOC concluded that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”¹³

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,¹⁴ harassment for “failing to conform to stereotypical notions of masculinity or femininity”,¹⁵ discrimination against transgender and gender non-conforming students,¹⁶ and failure to respect transgender students’ gender identity when operating single-sex classes.¹⁷ Similarly, the Department of Justice relies on *Oncale* and *Price Waterhouse* 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.’”¹⁸ The agency 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

⁹ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)

¹⁰ *See, e.g., Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) and *Terveer v. Billington*, 2014 WL 1280301 (D.D.C. Mar. 31, 2014).

¹¹ As an administrative body, the EEOC is not part of the judiciary. EEOC decisions are not binding on the federal courts, but they are generally given deference.

¹² *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

¹³ *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15 2015).

¹⁴ *Dear Colleague Letter: Harassment and Bullying*, U.S. Department Of Education, 8 (October 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

¹⁵ *Ibid.*

¹⁶ *Questions and Answers on Title IX and Sexual Violence*, U.S. Department Of Education, 5 (April 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (noting that the Office for Civil Rights “accepts such claims for investigation”).

¹⁷ *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. Department Of Education, (December 25, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

¹⁸ *Brief for the United States as Amici Curiae Supporting Appellant, G.G. v. Gloucester County School Board*, No. 15-2056, 13-14 (4th Cir. Oct. 28, 2015) (internal citations omitted).



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 is pending in the 4th Circuit at this time.

- *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.¹⁹ 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.²⁰ **This case makes it clear that Title IX prohibits educational institutions from forbidding students bathroom access in accordance with their gender identity.**²¹
- *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.**²²
- *Grimm v. Gloucester County School Board*: In this ongoing case a transgender student challenged a school district policy that prevented him from using bathroom and locker room facilities that accord with his gender identity as a violation of both the Equal Protection Clause of the Fourteenth Amendment and Title IX. Both the Department of Education and the Department of Justice submitted briefs in support of the plaintiff, but the district court granted the school district's motion to dismiss the Title IX claim. This decision is currently on appeal before the U.S. Court of Appeals for the Fourth Circuit. **This case makes it clear that the Departments of**

¹⁹ Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, No. 09-12-1020 (August 24, 2013), available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>. See also Resolution Agreement of the Downey Unified School District, No. 09-12-1095, (Oct. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>.

²⁰ 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.

²¹ Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for 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>

²² 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>



Justice and Education agree that denying a student bathroom access according to the student's gender identity is prohibited discrimination under Title IX.²³

The body of law around Title IX has solidified around the principle that discrimination against a transgender student, including in the provision of access to sex-segregated facilities such as bathrooms and locker rooms, is discrimination on the basis of sex as prohibited by Title IX. For this reason, should 2015-RO-12A become law, North Carolina would have a serious, costly legal challenge on its hands. Defending an administrative action is pricey in and of itself – the Township High school district cited above paid approximately \$62,500 in legal fees²⁴ – and the Department of Education alone disburses approximately \$4.5 billion dollars in federal funding to North Carolina educational institutions²⁵. That doesn't include federal money the state of North Carolina receives from other federal funding streams, which could also be at risk. Further, this memo focuses on the potential liability incurred around Title IX non-compliance, specifically; it did not examine the possible equal protection claims that could be brought by a student against a government entity that treated transgender students differently from their peers on the basis of their gender identity or sex.

As you consider how best to address issues of discrimination and public safety during your special session, please do so with the understanding that this bill protects no one and instead exposes school districts and potentially the state to tremendous exposure for litigation and administrative action while, at the same time, endangering \$4.5 billion in state education funds.²⁶ This bill is not a solution to an actual problem, but rather violations of students' civil rights that will result in nothing more than a hefty price tag for the state.

If I can be of any further assistance to you, please don't hesitate to call me at 202-628-4160.

Sincerely,

A handwritten signature in cursive script that reads "Sarah Warbelow".

Sarah Warbelow
Legal Director
Human Rights Campaign

²³ *G.G. v. Gloucester County Sch. Bd.*, 2015 U.S. Dist. LEXIS 124905 (E.D. Va. Sept. 17, 2015).

²⁴ According to a FOIA request conducted by the American Civil Liberties Union (ACLU) on file with the ACLU.

²⁵ Funds for State Formula-Allocated and Selected Student Aid Programs, U.S. Department of Education Funding. <http://www2.ed.gov/about/overview/budget/statetables/17stbystate.pdf> North Carolina pps 75-76, shows total estimate for 2017: \$4,495,005,149.

²⁶ *Ibid.*