



U.S. Department of Justice

Civil Rights Division

Washington, D.C. 20530

May 4, 2016

Via electronic and overnight mail

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University of North Carolina Board of Governors
c/o W. Louis Bisette, Jr., Chairman
General Administration
P. O. Box 2688
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Dear President Spellings, Chairman Bisette, and Mr. Shanahan:

On April 8, 2016, the United States Department of Justice (the "Department") requested information necessary to determine whether the University of North Carolina system (including its Board of Governors) ("UNC") is complying with Title IX of the Education Amendments of 1972 ("Title IX"), and its implementing regulations, and the Violence Against Women Reauthorization Act of 2013 ("VAWA").¹ Our information request described recent statements by President Spellings in an April 5, 2016 Memorandum titled "Guidance – Compliance with the Public Facilities Privacy & Security Act," in which you provided guidance on North Carolina House Bill 2 ("H.B. 2"). President Spellings' memorandum instructed Chancellors of the UNC system that "University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex." Memorandum at 1 (Q & A No. 2). Our letter asked, among other questions, whether your Memorandum still reflects the position of the UNC system regarding its obligations under, and its plans to comply with, H.B. 2.

¹ As described in our letter, our inquiry about the UNC system's Title IX and VAWA compliance was prompted by the recent enactment of North Carolina House Bill 2 ("H.B. 2"), which was signed into law and took effect on March 23, 2016. Part I of H.B. 2 states that "[p]ublic agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex," and defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." H.B. 2, Section 1.3, codified at N.C.G.S. 143-760(a)(1) & (b). The UNC system is a "public agency" under H.B. 2. See N.C.G.S. 143-760(a)(2) & (4).

UNC's response to our letter, dated April 13, 2016, confirmed issuance of the Memorandum, and attached an additional statement about the impact of H.B. 2 on the UNC System. See President Spellings' comments on the Public Facilities Privacy and Security Act (HB2), available at https://www.northcarolina.edu/sites/default/files/4.11.16_ms_statement_on_hb2_0.pdf. Nothing in your response to our letter or your supplemental statement changes President Spellings' instruction to Chancellors that University institutions "must require" every multiple-occupancy bathroom and changing facility to be "used only by persons based on their biological sex."

As a recipient of federal financial assistance, including financial assistance from the Department of Justice's Office of Justice Programs ("OJP") and Office on Violence Against Women ("OVW"), the UNC system must comply with Title IX and VAWA. As an employer, UNC is also obligated to comply with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). This letter serves as notice that the Department has determined that UNC is in violation of Title VII, Title IX, and VAWA and is seeking UNC's compliance. If we do not receive assurances and documentation on or before close of business on May 9, 2016 demonstrating UNC has taken the actions described below or comparable steps to achieve compliance, the Department will take enforcement action.

A. Federal Law Prohibits UNC from Discriminating Against Transgender Individuals.

Federal law prohibits UNC from discriminating based on sex, including gender identity. As a recipient of federal funds from OVW, UNC must comply with VAWA, which provides that "[n]o person in the United States shall, on the basis of actual or perceived * * * sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code) * * *, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [VAWA] * * *." 42 U.S.C. § 13925(b)(13)(A). As a condition of accepting funds from OVW, UNC signed assurances specifically acknowledging this requirement and "that it will comply with this provision."

Similarly, Title IX and its implementing regulations prohibit discrimination on the basis of sex in education programs and activities operated by recipients of federal financial assistance. 20 U.S.C. § 1681; 34 C.F.R. 106.31; 28 C.F.R. Part 54. As a condition of accepting funds from the Department, UNC signed assurances specifically acknowledging that it will comply with Title IX. Title IX's prohibitions of discrimination cover "any person," including students and employees, as well as third parties, such as parents and other visitors to campus. The U.S. Department of Education, Office for Civil Rights ("OCR"), has issued Title IX guidance clarifying that all students, including transgender students, are protected from sex-based discrimination under Title IX and that Title IX's prohibition on sex discrimination extends to discrimination based on gender identity.² See OCR's April 2014 Questions and Answers on

² Federal courts routinely look to OCR guidance when construing Title IX and other federal civil rights laws enforced by the United States. See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 529 U.S. 629, 647-48 (1999); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1993) ("OCR's policy interpretation [of Title IX] deserves

Title IX and Sexual Violence at B-2, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

While the Department of Education's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances, when a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. *See, e.g.*, OCR's December 2014 Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities at Q. 31, <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>. Under the Department of Education's interpretation of its regulations, where a school provides separate restrooms for men and women, barring a student from the restrooms that correspond to his or her gender identity because the student is transgender constitutes unlawful sex discrimination in violation of Title IX.

In your April 13th letter, you expressed interest in any additional authority or guidance on this issue. On April 19, 2016, the United States Court of Appeals for the Fourth Circuit issued an opinion in *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), regarding educational institutions' obligations to transgender students under Title IX and, in particular, under an implementing regulation promulgated by the Department of Education governing access to restrooms and locker rooms, 34 C.F.R. §106.33. In the *Gloucester* decision, the Fourth Circuit held that the Department of Education's guidance that educational institutions "generally must treat transgender students consistent with their gender identity" is entitled to "controlling weight" under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Gloucester*, 2016 WL 1567467 at *11.

Title VII also prohibits an employer from discriminating against an individual on the basis of sex. *See* 42 U.S.C. § 2000e-2. The Supreme Court made clear in *Price Waterhouse v. Hopkins* that discrimination on the basis of "sex" includes differential treatment based on any "sex-based consideration[]." 490 U.S. 228, 242 (1989) (plurality). Federal courts and administrative agencies have applied Title VII to discrimination against transgender individuals based on sex, including gender identity. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1315-20 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-08 (D.D.C. 2008); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *4-11 (EEOC Apr. 20, 2012). In addition, courts rely on Title VII precedent for guidance in analyzing discrimination claims under other federal civil rights laws, including Title IX. *See, e.g., Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

Access to sex-segregated restrooms and other workplace facilities consistent with gender identity is a term, condition, or privilege of employment. Denying such access to transgender

our great deference.").

individuals, whose gender identity is different from their gender assigned at birth, while affording it to similarly situated non-transgender employees, violates Title VII. Significantly, the U.S. Equal Employment Opportunity Commission (“EEOC”) recently addressed this very issue and held that “[e]qual access to restrooms is a significant, basic condition of employment,” and that denying transgender individuals access to a restroom consistent with gender identity discriminates on the basis of sex in violation of Title VII.” *Lusardi v. Dep’t of the Army*, No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015).

B. The UNC System is in Violation of Federal Law.

To date, UNC has not retracted its April 5, 2016 guidance instructing UNC system institutions to discriminate against transgender individuals by requiring “every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.” Memorandum at 1 (Q & A No. 2). In your April 13th response, you state that the “University and its constituent institutions will not change existing non-discrimination policies that apply to all students and employees, and we will not tolerate any sort of harassing or discriminatory behavior on the basis of gender identity or sexual orientation.” Yet, by issuing the April 5th Memorandum that UNC “is bound to comply with HB 2”—a position reiterated in President Spellings’ April 11th statement attached to your response—UNC has communicated to the campus community that individuals must use restrooms and other facilities that correspond to their “biological sex,” as defined by H.B. 2. This policy discriminates on the basis of sex, including gender identity, because it treats transgender individuals whose gender identities do not match their gender assigned at birth differently from similarly situated non-transgender individuals. Under H.B. 2, non-transgender individuals at UNC and its constituent universities may access campus restrooms and changing facilities that are consistent with their gender identity, while transgender individuals may not.

Even if UNC has no current “process or means to enforce H.B. 2’s provisions,” as you represent in your April 13th letter, the message to the UNC system (and reasonable inference by employees, students, and third parties) is that transgender individuals may not use facilities that correspond with their gender identity. This message conflicts with UNC’s obligations under Title VII, Title IX, and VAWA. UNC is therefore discriminating against transgender individuals on the basis of sex and gender identity.

C. Opportunity for Compliance and the Department’s Enforcement Authority.

1. Title IX and VAWA

When compliance with Title IX cannot be secured through voluntary means, compliance may be obtained by “any other means authorized by law,” including judicial enforcement. 20 U.S.C. § 1682. The Department also has the authority to enforce VAWA through civil actions. *See* 42 U.S.C. § 13925(b)(13)(C) (“The authority of the Attorney General . . . to enforce [VAWA’s discrimination prohibition] shall be the same as it is under section 3789d of this title.”); 42 U.S.C. § 3789d(c)(3) (“Whenever the Attorney General has reason to believe that a

State government or unit of local government has engaged in or is engaging in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in an appropriate United States district court.”).

2. Title VII

When the Attorney General of the United States has a reasonable basis to believe that a state agency has engaged in pattern or practice of discrimination in violation of Title VII, she may apply to the appropriate court for an order that will ensure compliance. *See* 42 U.S.C. § 2000e-6(a). This responsibility has been delegated to the Principal Deputy Assistant Attorney General of the Civil Rights Division.

Please advise the Department, therefore, no later than close of business on May 9, 2016 whether UNC has remedied these violations to comply fully with Title IX and VAWA, as well as its obligations as an employer under Title VII, including by retracting President Spellings’ April 5th Memorandum and April 11th statement and by advising the public, including UNC students, employees, and third parties, that, in accordance with federal law, individuals are permitted to access UNC restrooms and other facilities consistent with their gender identity.

We recognize that the enactment of H.B. 2 raised many questions and concerns for students, employees, and administrators at public and federally-funded schools in North Carolina. But President Spellings’ statement that UNC will not tolerate discriminatory behavior on the basis of gender identity cannot be reconciled with UNC’s limitations on bathroom access for transgender individuals on UNC campuses. UNC’s obligations to prohibit discrimination based on sex remain unchanged.

If you have questions about this letter, please contact: Shaheena Simons at (202) 305-3364/Shaheena.Simons@usdoj.gov or Delora Kennebrew at (202) 514-3831/Delora.Kennebrew@usdoj.gov.

Sincerely,



Vanita Gupta
Principal Deputy Assistant Attorney General

cc: Governor Pat McCrory
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