

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

**NORTH CAROLINIANS FOR
PRIVACY**, an unincorporated nonprofit
association;

Plaintiff,

vs.

**UNITED STATES
DEPARTMENT OF JUSTICE;**
LORETTA E. LYNCH, in her official
capacity as United States Attorney
General; **UNITED STATES
DEPARTMENT OF EDUCATION;**
and **JOHN B. KING, JR.**, in his official
capacity as United States Secretary of
Education.

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

North Carolinians for Privacy states as follows:

INTRODUCTION

1. The Plaintiff, North Carolinians for Privacy, brings this declaratory action pursuant to 28 U.S.C.A. §§ 2201-02 on behalf of its members, who are students in the University of North Carolina University System; students at elementary, middle, and high schools throughout North Carolina; and parents of the students who are minor children.

2. North Carolinians for Privacy asks this Court to declare that:

- a. The Department of Justice and the Department of Education may not lawfully rely on and enforce the Department of Education's redefinition of "sex" in Title IX, because the Department's agency action of redefining "sex" violated the Administrative Procedure Act;
- b. The maintenance of sex-specific restrooms and locker rooms by educational institutions does not violate the requirements of Title IX, codified at 20 U.S.C. §§ 1681 et. seq., which prohibits discrimination in education or educational benefits and programs because of a person's "sex;" and
- c. The maintenance of sex-specific restrooms and locker rooms by educational institutions does not violate the requirements of the Violence Against Women Act ("VAWA"), codified at 42 U.S.C.A. §§ 13925 et seq., which prohibits discrimination in certain programs and activities in education because of a person's "gender identity."

3. North Carolinians for Privacy also asks this Court to enjoin the Defendants from taking any action inconsistent with this Court's declaration that would affect its members' rights.

4. The federal Department of Justice ("DOJ") sent letters to the Governor of North Carolina, as well as the President of the University of North Carolina System, last Wednesday (May 4, 2016), demanding that the State and the

University System allow biological males to use restrooms and locker rooms designated for women, and to allow biological females to use restrooms and locker rooms designated for men.

5. DOJ's letters threatened that, if the State of North Carolina and the University System do not comply, DOJ would invoke its power to enforce Title IX through "any other means authorized by law,' including judicial enforcement," and to "enforce VAWA through civil actions," and revoke federal funds made available pursuant to Title IX and VAWA.

6. Yesterday, May 9, 2016, the DOJ filed suit against the State of North Carolina and the University System.

7. At a press conference announcing the lawsuit, United States Attorney General Loretta Lynch stated that DOJ "retain[ed] the option of curtailing federal funding" for North Carolina and its schools, including the University System.¹

8. In response to a question at the press conference, Attorney General Lynch stated that, "It would be premature right now to give a date on when we actually will take that step" of revoking federal funds.²

¹ Department of Justice, "Remarks as prepared for Delivery," May 9, 2016, *available at* <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint> (last visited May 9, 2016).

² Jane Stancill, "UNC President Spellings: UNC system caught in middle of state, federal fight on HB2," *The News & Observer*, May 9, 2016, *available at* <http://www.newsobserver.com/news/local/education/article76612287.html> (last visited May 9, 2016).

9. The University System's spokesperson has publicly stated that the University System's federal funds, including its students' eligibility for student loans, are at stake.³

10. The total amount of federal funds at stake is approximately \$1.4 billion, while the total amount of federal student loans that the University System's students will lose is approximately \$800 million.⁴

11. Some of the members of North Carolinians for Privacy are students currently within the University System, or will be students within the University System beginning next year.

12. All of these students' educational opportunities will be adversely impacted if the federal government revokes the federal funding that the University System receives.

13. Additionally, some of these students receive currently Pell Grants, federal student loans, or other sources of federal funding, all of which is now at risk.

14. These students' current and future educational opportunities, as well as their financial ability to secure an education at colleges within the University System, will be directly impacted if the federal government determines that the

³ Emery P. Dalesio, "NC college system's federal funds in crosshairs of LGBT law," *CTPost*, May 8, 2016, available at <http://www.ctpost.com/news/politics/article/North-Carolina-leaders-denounce-federal-threat-on-7394507.php> (last visited May 8, 2016).

⁴ Pete Williams et al., "DOJ Files Lawsuit Challenging North Carolina Bathroom Law," *NBC News*, May 9, 2016, available at <http://www.nbcnews.com/news/us-news/north-carolina-gov-pat-mccrory-faces-monday-deadline-lgbt-law-n570396> (last visited May 9, 2016).

University System is in violation of Title IX, and so makes those students ineligible to receive this federal financial assistance while attending the University System.

15. Also included within North Carolinians for Privacy are elementary and secondary school students and their parents.

16. Their schools are public schools in North Carolina that receive federal funding pursuant to Title IX.

17. They are aware that the federal government has previously threatened to revoke federal funding when public school districts sought to maintain sex-specific restrooms and locker rooms.

18. DOJ's letter to the Governor indicates that DOJ requires their public elementary and secondary schools to allow biological male students entry and use of the restrooms and locker rooms designated for females, and also to allow biological female students entry and use of the restrooms and locker rooms designated for males.

19. DOJ is threatening to revoke Plaintiff's members' schools' federal funding pursuant to Title IX if the State does not require its public schools to grant such rights of entry and use.

20. Their educational opportunities will be adversely impacted if the federal government revokes their schools' federal funding.

21. In its letters to the State and the University System, DOJ relied on a new rule, created by the Department of Education ("DOE"), that forbids educational institutions from maintaining sex-specific restrooms and locker rooms.

22. DOJ also stated that Title IX and VAWA forbid sex-specific restrooms and locker rooms in educational institutions.

23. DOE's action in creating its new rule violates the Administrative Procedure Act, codified at 5 U.S.C. §§ 500 et seq., and is unlawful, as is DOJ's reliance on it.

24. Title IX and VAWA both allow for sex-specific restrooms and locker rooms.

25. North Carolinians for Privacy therefore seeks a declaration from this Court to that effect, in order to put an immediate end to the ongoing threat to their ability to access educational opportunities at elementary, middle, and high schools throughout North Carolina and at colleges within the University System.

JURISDICTION AND VENUE

26. This action arises under 28 U.S.C.A. §§ 2201-02 (the "Declaratory Judgments Act"), 5 U.S.C. §§ 500 et seq. (the "Administrative Procedure Act" or the "APA"), and 20 U.S.C. §§ 1681 et. seq. ("Title IX").

27. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1361, and 1367.

28. The Court has jurisdiction to issue the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

29. The Court has jurisdiction to award the requested injunctive relief under 5 U.S.C. §§ 702 and 703, 20 U.S.C. § 1683, and Federal Rule of Civil Procedure 65.

30. The Court has jurisdiction to award reasonable attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412.

31. Venue lies in this district pursuant to 28 U.S.C. § 1391(b) and (e), because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this district.

PLAINTIFF

32. Plaintiff North Carolinians for Privacy is an unincorporated non-profit association organized under N.C. Gen. Stat. Ann. § 59B-1 through B-15, and headquartered in Raleigh, North Carolina.

33. North Carolinians for Privacy exists to advocate for, and protect, bodily privacy in the State of North Carolina and to ensure their members need not give up their right to privacy in order to access educational opportunities at elementary, middle, and high schools throughout North Carolina and at colleges within the University System.

34. Its members have an interest in this litigation because the action of the DOJ threatens bodily privacy rights in North Carolina and their ability to continue to access educational opportunities at elementary, middle, and high schools throughout North Carolina and at colleges within the University System.

35. North Carolinians for Privacy's members are all United States citizens and residents of the State of North Carolina.

36. Some of its members are directly impacted by DOJ's actions, which threaten to revoke federal funding if the State and University System do not allow

biological males the right of entry and use of restrooms and locker rooms designated for females, and vice versa.

37. Some of its members are students within the University of North Carolina System (the “**University Students**”), or will be matriculating next school year as freshmen to colleges within the University System.

38. Some of its members are students in North Carolina elementary schools, middle schools, or high schools that receive federal funding (the “**Minor Students**”).

39. Some of its members are parents of Minor Students (the “**Parents**”).

DEFENDANTS

Defendant Department of Justice

40. Defendant Department of Justice is an executive agency of the United States government and is responsible for the enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106. DOJ also has authority to bring enforcement actions to enforce Title IX and VAWA.

Defendant Attorney General Loretta E. Lynch

41. Defendant Loretta E. Lynch is the United States Attorney General. In this capacity, she is responsible for the operation and management of the DOJ. Lynch is sued in her official capacity only.

Defendant Department of Education

42. Defendant Department of Education is an executive agency of the United States government and is responsible for the promulgation, administration,

and enforcement of Title IX, 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106.

43. DOE is responsible for adopting, promulgating, and enforcing its new legislative rule interpreting “sex” in Title IX to mean, or include, gender identity.

Defendant Secretary John B. King, Jr.

44. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of the DOE. King is sued in his official capacity only.

STATEMENT OF FACTS

**I. DOJ Relies on DOE’S Unlawful Agency Action
And Misunderstandings of VAWA**

A. Title IX and Its Meaning

45. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681.

46. The regulations implementing Title IX provide, in relevant part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular...or other education program or activity operated by a recipient which receives Federal financial assistance.” 34 C.F.R. § 106.31(a).

47. The implementing regulations also provide that a funding recipient shall not on the basis of sex: “Treat one person differently from another in

determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; ... Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; ... Deny any person any such aid, benefit, or service; ... Subject any person to separate or different rules of behavior, sanctions, or other treatment; ...[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.” 34 C.F.R. § 106.31(b).

48. Nothing in Title IX’s text, structure, legislative history, or accompanying regulations addresses gender identity.

49. The term “gender identity” does not appear in the text of Title IX.

50. The term “gender identity” does not appear in the regulations accompanying Title IX.

51. The term “gender identity” does not appear in the legislative history relating to Title IX.

52. Indeed, recognizing that Title IX does not protect against discrimination because of “gender identity” (but only against discrimination because of biological sex), beginning in 2011, Senator Al Franken has repeatedly introduced legislation modeled after Title IX that would protect against discrimination because of gender identity in the education context, just as Title IX protects against discrimination because of sex.

53. That legislation has failed to pass every year it has been introduced.

54. Title IX and the accompanying regulations use the term “sex,” not “gender identity,” in describing the type of discrimination prohibited.

55. The term “sex” as used in Title IX and its implementing regulations means male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex.

56. Title IX also states that “nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes[.]” 20 U.S.C. § 1686, indicating that Congress intended that Title IX would respect student privacy rights.

57. Title IX’s accompanying regulations confirm that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

58. Preventing the mixing of biological boys and girls in intimate environments like restrooms, locker rooms, and showers is the very reason that Congress allowed for separate living facilities, and that Title IX regulations allow for separate restrooms, locker rooms, and changing areas, for the different sexes.

B. DOE’s Unlawful Agency Action

59. Under the Administrative Procedure Act, any “rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with

the APA's notice-and-comment requirements, regardless of how they initially are labeled." 72 Fed. Reg. 3433.

60. Such legislative rules enacted under Title IX must also be "approved by the President" before they become effective. 20 U.S.C. § 1682.

61. DOE took agency action and declared that the term "sex" as used in Title IX's prohibition on sex discrimination now means, or includes, "gender identity."

62. This agency action constituted the creation of a new legislative rule, because it announced a new policy position, which the agency is treating as binding.

63. DOE announced this new legislative rule redefining "sex" to schools nationwide in several DOE guidance documents published over the last few years, including the following: U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, 5 (Apr. 2014); U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, 25 (Dec. 2014); U.S. Department of Education, Office for Civil Rights, *Title IX Resource Guide*, 1, 15, 16, 19, 21-22 (Apr. 2015).

64. DOE's new rule requires educational institutions to treat students consistently with their perceived gender identity, regardless of biological sex.

65. DOE has enforced its new rule in numerous secondary school districts around the country.

66. For example, DOE threatened Palatine, Illinois, Township High School District 211 with the loss of \$6 million dollars in federal funds if it failed to grant a biologically male student access to the girls' locker and shower rooms.

67. DOE has treated its declaration that Title IX bars gender identity discrimination as a legislative rule that is binding on all schools that are subject to Title IX.

68. DOE is actively enforcing this legislative rule against schools across the country.

69. DOE did not comply with APA's notice-and-comment requirements when it adopted its legislative rule redefining "sex" in Title IX to include gender identity and mandating that schools give students seeking access to opposite sex facilities based on their gender identity the access they desire.

70. DOE's new rule was not published for notice and comment.

71. DOE's new rule was not signed by the President.

C. DOJ's Improper Reliance on DOE's Unlawful Agency Action

72. Last week, on Wednesday, May 4, 2016, the federal Department of Justice (DOJ) sent letters to the Governor of the state of North Carolina (**the "Letter to the Governor"**),⁵ along with the President of the University of North Carolina System (**the "Letter to the University System"**).⁶

⁵ Letter, U.S. Department of Justice Civil Rights Division to Governor Pat McCrory, May 4, 2016, *available at* <https://assets.documentcloud.org/documents/2823410-Civil-Rights-Division-letter-on-HB2.pdf>; Letter, U.S. Department of Justice Civil Rights Division to Margaret Spellings, President, University of North Carolina, May 4, 2016, *available at* <http://www.charlotteobserver.com/news/politics->

73. Those letters stated that if the State and University System complied with a North Carolina law known as H.B. 2, which requires multiple occupancy bathroom or changing facilities to be designated for the use of only students of one biological sex, the State would violate Title VII, and the University System would violate Titles VII, IX and VAWA.

74. Those letters also include a demand: stop enforcing H.B. 2 or face imminent enforcement actions, including a revocation of their federal funding.

75. DOJ's lawsuit, filed against the State and the University System, amplified that demand.

76. The letters and the lawsuit together create an unmistakable ultimatum: either submit to the will of DOJ by prohibiting sex-specific restrooms and locker rooms in educational institutions, or face the consequences, including revocation of federal funds (“the Ultimatum”).

77. The Letter to the Governor notes in footnote 3 that H.B. 2 applies to local boards of education, thus recognizing that public schools are prohibited by state law from allowing biological males to enter and use private facilities designated for females, and vice versa. Letter to the Governor, *supra* note 5, at 2 n.3.

government/article75647942.ece/BINARY/Read:%20DOJ%20letter%20to%20UNC (last visited May 8, 2016).

⁶ Letter, U.S. Department of Justice Civil Rights Division to Margaret Spellings, President, University of North Carolina, May 4, 2016, *available at* <http://www.charlotteobserver.com/news/politics-government/article75647942.ece/BINARY/Read:%20DOJ%20letter%20to%20UNC> (last visited May 8, 2016).