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VIA FEDERAL EXPRESS

March 8, 2010

The Honorable Kenneth T. Cuccinelli, II
Attorney General of the Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219

Re: *Sexual Orientation Nondiscrimination Policies of Virginia's Public Universities*

Dear Attorney General Cuccinelli,

Lambda Legal is the nation's oldest and largest legal organization dedicated to achieving recognition of the civil rights of the lesbian, gay, bisexual, and transgender ("LGBT") community. We were counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and co-counsel in *Romer v. Evans*, 517 U.S. 620 (1996), the two most important cases ever decided by the U.S. Supreme Court addressing sexual orientation and the law. We have reviewed a published copy of your March 4, 2010 letter to the presidents, rectors, and visitors of the Commonwealth's public universities, in which you set forth your opinion that none of those institutions are authorized to maintain policies prohibiting discrimination on the basis of sexual orientation, gender identity, or gender expression.

We submit that this Opinion is analytically flawed in at least two major respects.[1] First, the Opinion misunderstands and understates the authority of universities to implement policies that do not undermine the General Assembly's enactments. Second, the Opinion ignores the fact that discrimination on the basis of sexual orientation, gender identity, or gender expression violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution unless such state-sponsored differential treatment is, at minimum, rationally related to a legitimate state objective.

The opinion accurately cites the expansive power of a Virginia university to take actions and enact policies it deems in accordance with its mission: a university "has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted."[2] Indeed, many applications of a university nondiscrimination policy concern areas in which the General Assembly has provided specific grants of power to the universities.[3]

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[1] Because the March 4, 2010 letter asked that the letter be regarded as an opinion, we will use that word in referring to the letter.

[2] *Goodreau v. Rector & Visitors*, 116 F. Supp. 2d 694, 703 (W.D. Va. 2000) (*quoting Batcheller v. Commonwealth*, 176 Va. 109, 123, 10 S.E.2d 529, 535 (1940)); *see also, e.g.*, Va. Code Ann. § 23-76 (allowing the board of visitors of the University of Virginia to "generally, in respect to the government and management of the University, make such regulations as they may deem expedient, not being contrary to law.").

[3] The General Assembly has granted the governing body of every state university the authority to establish "rules and

Recent Attorney General opinions have recognized that a university regulation is invalid only if it actually undermines an enactment of the General Assembly. In 2007, the Attorney General opined that the University of Virginia was free to extend gym privileges beyond a student's spouse and children to allow any adult living with the student to use gym facilities. There was no statutory provision authorizing said extension, but neither did it contravene any legislative enactment, so it was permissible.[4] Also, per 2006 Opinion 05-078, the General Assembly's specific grant of authority to all universities in dealing with "the conduct of students and employees" would permit universities to prohibit them from carrying concealed weapons on campus, but universities could not enforce such rules against the general public, given the specific statutory authority given permit-holders to carry weapons.[5]

The Opinion mistakenly relies on the position in prior opinions that *cities and counties* lack the authority to add to categories in discrimination statutes without the General Assembly's approval.[6] However, these decisions were based on application of the Dillon Rule regarding the relationship between state and local government, which principle the Attorney General recently and repeatedly has recognized is simply inapplicable in determining the authority of state universities to take certain actions.[7]

The Opinion also relies on 2006 Opinion 05-094, in which the Attorney General inveighed against the validity of the Executive Orders of Governors Mark Warner and Tim Kaine that barred sexual orientation discrimination in state employment. However, 2006 Opinion 05-094 relied on a selective reading of what sources of law can constrain the actions of Commonwealth officials. That Opinion cited approvingly Governor Holton's 1973 Executive Order regarding employment discrimination because it "was based on the policy of nondiscrimination established by the General

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regulations for the acceptance and assistance of students . . .; rules and regulations for the conduct of students . . . ; and rules and regulations for the employment of professors, teachers, instructors and all other employees." Va. Code Ann. § 23-9.2:3(1),(2),(5).

[4] 2007 Op. Va. Att'y Gen. 07-018. That Opinion noted that the university's criteria were not based on any personal relationship between the student and the adult in the same residence, and thus could not run afoul of VA. CONST. art. 1, § 15-A. See 2007 Op. Va. Att'y Gen. 07-018 at n.9.

[5] Va. Op. Att'y Gen. 05-078 (2006); *see also Goodreau*, 116 F. Supp. 2d at 703 ("Because degree revocation is reasonably necessary to effectuate the Board's power to confer degrees and to regulate student discipline, that power must be implied, giving the Board the authority to revoke a degree for good cause and after due process.").

[6] 1982-1983 Op. Va. Att'y Gen. 286; 1985-1986 Op. Va. Att'y Gen. 16, 1993 Op. Va. Att'y Gen. 68; 2002 Op. Va. Att'y Gen. 105; 2002 Op. Va. Att'y Gen. 107.

[7] 2007 Va. AG LEXIS 17 n.5 ("The relationship between the Commonwealth and its universities and colleges is not akin to the relationship between the Commonwealth and cities and counties. The Dillon Rule is not applicable to state agencies." See 2006 Op. Va. Att'y Gen. 5, 10 n.28 (forthcoming May 2007), available at http://www.vaag.com/OPINIONS/2006opns/06-034w.pdf.").

Assembly" in a *housing* law passed the previous year.[8] However, as the Opinion concedes, Governor Holton included three categories – sex, age, and political affiliation – that the General Assembly had not included.[9] In defending the validity of the 1973 Order, the Attorney General correctly recognized that Virginia statutes alone are not the only relevant source of law that constrains the actions of Virginia public officials: "Federal law imposed upon the Commonwealth at the time may be relevant to the classes enumerated by Governor Holton."[10] The Opinion also recognized the relevance of judicial precedent, but then proceeded to cite an absence of any Virginia Supreme Court authority holding "sexual orientation as a protected class," while ignoring the fact that the United States Supreme Court and many other federal and state courts have held that state action against people based on their sexual orientation violates the Equal Protection Clause unless it is, at minimum, rationally related to a legitimate state objective.[11]

The Constitution prohibits the states from denying individuals equal protection of the laws. U.S. Const. Amd. XIV; *Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado's Amendment 2, which overrode all state and local sexual orientation discrimination provisions); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (police's selective targeting of lesbians for arrest violated Equal Protection). It is well-established, according to numerous courts, that the government violates equal protection guarantees when it discriminates against employees based on sexual orientation. *See, e.g., Miguel v. Gue*ss, 112 Wash. App. 536, 554, 51 P.3d 89, 97 (2002) ("we hold that a state actor violates a homosexual employee's right of equal protection when it treats that person differently than it treats heterosexual employees, based solely upon the employee's sexual orientation."); *Quinn v. Nassau County Police Dept.*, 53 F.Supp.2d 347, 357 (E.D.N.Y. 1999) ("a hostile work environment directed against homosexuals [employed by the government] based on their sexual orientation constitute[s] an Equal Protection violation."); *Emblen v. Port Authority of New York/New Jersey*, 2002 WL 498634, 7 (S.D.N.Y. 2002) ("Courts have held that anti-homosexual harassment [of government employees] can constitute a cognizable claim under Section 1983."); *Lovell v. Comsewogue School Dist.*, 214 F.Supp.2d 319, 323 (E.D.N.Y. 2002) ("Accordingly, Lovell's claim that [as a public school employee] she was discriminated against based on her sexual orientation is actionable under the Equal Protection clause."); *Snetsinger v. Montana University System*, 325 Mont. 148, 157, 104 P.3d 445, 452 (2004) (under the Equal Protection Clause, public university could not discriminate against its gay employees in provision of employee benefits); *Glover v. Williamsburg Local School Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 1998) (school district violated public school teacher's equal protection rights when it fired him after he was seen holding hands with male partner at school holiday party); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) ("Because a

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[8] 2006 Op. Va. Att'y Gen. 05-094.

[9] *Id.* at n. 15.

[10] *Id.*

[11] *See Id.* at n.18. The application of the federal Constitution's equal protection requirement to Virginia schools should be abundantly clear, given the United States Supreme Court's ruling that Virginia Military Institute's discriminatory admission policies violated precisely that provision. *United States v. Virginia*, 518 U.S. 515 (1996).

community's animus toward homosexuals can never serve as a legitimate basis for state action, the defendant's acts [in removing a woman from being a public school's volleyball coach based on her being a lesbian] violate the Equal Protection Clause."). The Equal Protection Clause is also violated by state discrimination on the basis of gender identity and expression. *See*, *Glenn v. Brumby*, 632 F. Supp. 2d 1308 (N.D. Ga. 2009).

In short, Virginia's universities are authorized to decide what categories of discrimination they will oppose, based on both their specific statutory authority to regulate admission, advancement, conduct, and employees; as well as all universities' general authority to enact policies furthering their educational mission, so long as such policies do not undermine a specific provision of existing law. Additionally, it is not only permissible but advisable for state officials to consider all controlling sources of law that may affect their conduct, whether state or federal, and whether legislative, executive, or judicial.

We thank you for the opportunity to correct the record as to the ability of Virginia's public universities to enact and maintain policies to address discrimination to promote a safer and more productive learning environment and to ensure that all of the many talented students, faculty, and employees of the universities are valued. We welcome the opportunity to address any questions or concerns you may have.

Sincerely,

Gregory Nevins (hg)

Gregory Nevins
Supervising Senior Staff Attorney
Southern Regional Office

Hayley Gorenberg
Deputy Legal Director

cc: Debra Bazarsky and Gabriel Javier, Co-Chairs
Consortium of Higher Education Lesbian Gay Bisexual Transgender Resource Professionals