



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Presidents, Rectors, and Visitors of
Virginia's Public Colleges and Universities

Attorney-Client Privileged Communication

Dear Ladies and Gentlemen:

Several inquiries recently have been made regarding the authority of Virginia's public colleges and universities to approve inclusion of "sexual orientation," "gender identity," "gender expression," or like classifications in the non-discrimination policy of the respective institution. Simultaneously with these inquiries, letters from this office to various colleges addressing this issue have been released into the public arena, prompting more questions regarding the application of this office's advice.

In order to ensure that no confusion exists with regard to the advice of this office or to the legal status of any existing or anticipated policy of a specific college, please consider this letter as the opinion and advice of the Office of the Attorney General.

It is my advice that the law and public policy of the Commonwealth of Virginia prohibit a college or university from including "sexual orientation," "gender identity," "gender expression," or like classification, as a protected class within its non-discrimination policy, absent specific authorization from the General Assembly.

Virginia's colleges and universities are public institutions. Each Board of Visitors is vested with broad rights and powers conferred by the provisions of the Code of Virginia. In addition, Boards have the authority to make needful rules and regulations and generally direct the affairs of the college. Beyond this statutory framework, the Commonwealth recognizes that a university "has not only the power expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary" to effectuate its granted powers.¹ Examples are numerous – particularly in the area of student safety and discipline – where universities operate within a wide range of implied

¹ *Batcheller v. Commonwealth*, 176 Va. 109 (1940).

authority. This broad authority, however, is not without limits. Virginia's public universities are, at all times, subject to the control of the General Assembly.² They are state agencies – arms of the state – tasked with fulfilling the commitment of the Commonwealth to provide education to the students of Virginia. As such, they have no authority greater than that of the body that created it and from whom they derive their expressed and implied authority. That body is the General Assembly of Virginia.

The General Assembly has considered and defined the protected classes for purposes of non-discrimination statutes. It has specifically defined unlawful discrimination at educational institutions. The Virginia Human Rights Act states that it is the policy of the Commonwealth to “safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, *including educational institutions...*”³ (emphasis added). In addition to this affirmative statement, the General Assembly has on numerous occasions considered and rejected creating a protected class defined by “sexual orientation,” “gender identity” or “gender expression.”⁴ Lacking this clear authority, no state agency can reach beyond the boundaries established by the General Assembly.

Analogous to the General Assembly's legislative stance, prior opinions of the Attorney General have found that localities have no authority to expand their non-discrimination policies. In 1982, Attorney General Gerald L. Baliles addressed the general issue of expansion of a state discrimination law by a locality. He concluded: “To the extent that [amendments to the Human Rights Ordinance of the County of Fairfax] either enlarge upon the definitions of the protected class of persons as presently defined by State statute, or declare particular acts to be unlawful under local ordinance and thereby provide separate local penalties or exactions for violations, I am constrained to conclude that the amendments are invalid because the board of supervisors does not presently have the authority to enact them.”⁵

² “It is plain that the University of Virginia is in the strictest sense a public institution ... and controlled solely by the State ... and that the interest of the public constitutes its ends and aims.” *Phillips v. Rector & Visitors of University of Virginia*, 97 Va. 472, 475-476 (1899).

³ VA. CODE ANN. § 2.2-3900. See also the Virginia Fair Employment Contracting Act, which establishes the Commonwealth's prohibition against employment discrimination, and defines protected classes as “race, color, religion, sex, or national origin.” VA. CODE ANN. § 4200.

⁴ Since 1997, the General Assembly has on more than 25 occasions considered and rejected bills adding “sexual orientation” to various nondiscrimination statutes. Last session, the phrase “gender identity or expression” was included among the rejected bills. See 2009 SB 1247 (A bill to add sexual orientation to the definition of unlawful discriminatory practice in the Virginia Human Rights Act. Stricken at request of Patron in General Laws and Technology 15-0); HB 2668 (A bill to add to the Fair Housing Law discrimination based on sexual orientation as an unlawful discriminatory housing practice. Left on the table in General Laws Subcommittee); HB 2385 (A bill to prohibit discrimination in public employment based on sexual orientation. The bill defined “sexual orientation” as “a person's actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression.” Left on the table in General Laws Subcommittee).

⁵ 1982-1983 Op. Va. Att'y Gen. 286.

In 1985, Attorney General William G. Broaddus concluded that the city of Alexandria did not have the authority to enlarge the categories of protected persons as defined in state statutes by enacting an ordinance prohibiting discrimination on the basis of sexual preference.⁶ In 1993, Attorney General Stephen D. Rosenthal concluded that Arlington County was not authorized to prohibit discrimination based on sexual orientation to any greater extent than it is prohibited by state law.⁷ Two opinions in 2002 by Attorney General Jerry Kilgore reached the same conclusion as did his predecessors.⁸

In 2006, this office concluded that the addition of sexual orientation as a protected employment class by way of an executive order of the Governor was intended to, and did, alter the public policy of the Commonwealth. "Changing public policy of the Commonwealth is within the purview of the General Assembly and, therefore, beyond the scope of executive authority and is unconstitutional."⁹ Acting consistently with this advice, the current Governor has revised and reissued the executive order to bring it in line with the law and policy of Virginia.

Taken together, these legislative, executive, and legal actions establish a consistent public policy of the Commonwealth regarding the classification of sexual orientation and gender expression as a protected class. A Board of Visitors cannot adopt a policy position for which no authority has been granted or that has repeatedly been rejected by the General Assembly. This applies as well, by extension, to the Board's agent – the president of the college.

Apart from the lack of authority to create such a protected class, the inclusion of such classifications in institutional non-discrimination policies invites creative litigants to deem a university's benign non-discrimination statement to mandate, by contract, particular benefits or privileges to individuals based on such classifications. This outcome would also stand in stark contrast to the Commonwealth's public policy.

Accordingly, it is my advice that the law and public policy of the Commonwealth of Virginia prohibit a college or university from including "sexual orientation," "gender identity," "gender expression," or like terms in its non-discrimination policy as a protected class absent specific authorization from the General Assembly. I see no significant difference in this policy being adopted by formal Board resolution or by presidential action.

⁶ 1985-1986 Op. Va. Att'y Gen. 16.

⁷ 1993 Op. Va. Att'y Gen. 68.


⁸ See 2002 Op. Va. Att'y Gen. 105; 2002 Op. Va. Att'y Gen. 107.

⁹ 2006 Op. Va. Att'y Gen. 05-094.

I am aware that several Virginia colleges and universities have included "sexual orientation" in their respective policies. For the reasons stated, any college or university that has done so has acted without proper authority. Such invalid policies create, at a minimum, confusion about the law and, at worst, a litany of instances in which the school's operation would need to change in order to come into conformance. Accordingly, I would advise the Boards of each college to take appropriate actions to bring their policies in conformance with the law and public policy of Virginia.

Please feel free to contact me if you have any further questions. I appreciate the opportunity to be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken C II", written over a horizontal line.

Kenneth T. Cuccinelli, II
Attorney General