

January 19, 2010

John P. Gause  
Commission Counsel  
Maine Human Rights Commission  
51 State House Station  
Augusta, Maine 04333-0051

Dear John:

Thank you for taking the time to meet with various stakeholders to discuss the draft guidance regarding "Sexual Orientation in Schools and Colleges." It was a great opportunity for people to voice concerns about the issues raised in the guidance.

The University of Maine System ("the University") is not taking a position either for or against the draft guidance recently circulated by the Commission staff. With that said, I would like to point out some potential dilemmas faced by the University if the guidelines are adopted as currently drafted.

Documentation: The draft guidelines state plainly that institutions cannot ask for "proof" of their sexual orientation. When presented with the situation of a transgender student seeking to participate in a gender-segregated sport in accordance with their gender identity or expression, this would leave the institution without any way to determine the *bona fide* nature of the gender identity or expression.

The flat prohibition in the guidelines appears to be in marked contrast to other situations in which an accommodation may be requested. It is routine practice to seek documentation of non-obvious disabilities in the event of an accommodation request. Even in the case of religious accommodations, an employer may sometimes seek additional information regarding either the religious nature of the request or the sincerity of a particular belief. See, e.g., EEOC, Compliance Manual, §§ 12-I(A)(3) and 12-IV(A)(2), n.127 (citing *Bushouse v. Local Union 2209, United Auto, Aerospace, & Agric. Workers of Am.*, 164 F. Supp. 2d 1066, 1078, n.18 (N.D. Ind. 2001), for the proposition that, where an employer has an "objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.")

Sports Teams: During the meeting, you reminded us that the section regarding sports participation is governed by the statute's reasonable accommodation requirements. It may be helpful for the section to reflect more clearly the case-by-case analysis necessary for determining the reasonableness of a requested accommodation, as already provided in the Maine Human Rights Act. As the current language acknowledges, there will likely be cases in which allowing a transgender student to participate in gender-segregated sports in accordance with the gender identity or expression will raise legitimate concerns about fairness in competitive interscholastic

sports. Although such requests from transgender students may be very rare, among those, the fairness of play may become an issue.

The University also wanted to take the opportunity to point out some scenarios that could cause unintended consequences. For example, based on information provided by the National Collegiate Athletic Association (NCAA) on this issue, a transgendered individual's participation on a gender-segregated team could result in the NCAA's treating that team as a mixed team. This would have a number of serious consequences including potentially impacting the institution's compliance with Title IX. The Court in Biedieger v. Quinipiac University, 616 F. Supp. 2d 277, 297 (D. Conn. 2009), indicated that participation on a team may not satisfy the requirements of Title IX unless it can be shown that the student-athlete's participation was genuine. It is possible that a court could find that, although most of a mixed-team's membership was female, that those female participants do not count toward the institution's female participation numbers because the participation experience was limited by the fact that they could only participate against other mixed teams which would dramatically the team's competition opportunities.

In addition, because mixed teams do not count toward the institution's total number of teams for NCAA compliance purposes, a reclassification could result in that institution's losing its Division I status for not having the requisite number of teams. Division I is the top level of collegiate competition, highly prized by institutions as essential to recruiting athletes and fans

Further, the guidelines do not currently incorporate the Washington Interscholastic Activities Association's approach to this issue. However, the University would like to reiterate the differences between intrastate primary and secondary competition and intercollegiate athletic competitions. Intrastate competition could possibly be governed by a uniform set of rules mandating a particular approach. College sports, however, almost all involve competition with institutions from other states with different state laws governing the issue of transgender participation. Therefore, attempting to issue a one-size-fits-all approach on this subject would be problematic. Rather, the guidance should reflect the individualized analysis required when considering any request for accommodation.

Thank you very much for the opportunity to provide feedback. Please do not hesitate to call if you have any questions.

Sincerely,



Karen K. Kemble, Director  
Office of Equal Opportunity