

Society of American Law Teachers—SALT—Criticizes Virginia Attorney General for Advising Public Colleges and Universities to Remove Sexual Orientation From Their Non-Discrimination Policies

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The Society of American Law Teachers (SALT) rebukes the Attorney General of Virginia for recent statements advising the Commonwealth's public colleges and universities to remove "sexual orientation," "gender identity," "gender expression" or like characteristics from their non-discrimination policies. Attorney General Cuccinelli's letter is an affront to the ideals of equal protection under the law, established legal precedent recognizing constitutional protections against discrimination based on sexual orientation, and well-established principles of academic freedom. SALT calls on the Virginia General Assembly to condemn the Attorney General's statement and to affirm the authority colleges and universities have to maintain their current non-discrimination policies.

Regardless of state law or policy, public universities are required to prohibit discrimination based on sexual orientation under the federal Constitution. In *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court held that discriminatory laws based on sheer animus toward lesbian and gay persons violate the Equal Protection Clause of the Fourteenth Amendment. Consistent with these principles, courts have repeatedly held that public employers may not discriminate on the basis of sexual orientation. *Quinn v. Nassau County Police Dept.*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (harassment of police officer because his sexual orientation violated Equal Protection Clause); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Ut. 1998) (termination of high school teacher's position as volleyball coach because of sexual orientation violated equal protection); *Miguel v. Davis*, 51 P.3d 89 (Wash. Ct. App. 2002) (state employer's differential treatment of employees because of sexual orientation violated right to equal protection); *Glover v. Williamsburg Local School Dist. Bd. Of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (firing teacher because of his sexual orientation violated Equal Protection Clause). Similarly, courts have held that public schools may not discriminate against students based on sexual orientation. *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446

(7th Cir. 1996); *O.H. v. Oakland Unified School Dist.*, 2000 WL 33376299 (N.D. Cal. 2000).

The Attorney General's statement undermines the broad autonomy granted schools to define and meet their educational mission. A school's non-discrimination policy plays a vital role in meeting its pedagogical goals. Schools that adopt such policies do so based on the deeply held view that an environment conducive to teaching and learning is not possible if harmful, irrational discrimination is supported or condoned by the school. Such anti-discrimination policies give substance to the pedagogical message that bigotry and intolerance will not be permitted on campus and demonstrate that the school will not discriminate or abet others who do.

In keeping with these core educational goals, there is a broad consensus in higher education that university non-discrimination policies apply to sexual orientation. All other major state universities in the South adhere to this understanding. All of Virginia's major state universities presently include sexual orientation in their non-discrimination policies. In addition to the universities themselves, there are a myriad of academic professional associations that have such policies in place. Some, like the Association of American Law Schools (AALS), an organization of member law schools representing almost all U.S. law schools, require that their members have in place a non-discrimination policy that includes sexual orientation (with a narrow exception for religiously-based institutions). If Virginia's well regarded law schools removed sexual orientation from their non-discrimination policies, they might be denied continued AALS membership. By taking such action, Virginia's universities would be in danger of harming their academic reputations and the quality of their faculty, staff, and student bodies.

The attorney general has reached out to affirmatively invite discrimination and harassment of LGBT students, faculty, and staff, and to foster an educational atmosphere of hate and intolerance. It is far from clear that he has the authority either to issue or enforce his directive. Public universities generally are afforded a great deal of autonomy by state governments. Certainly state legislative bodies do not design university curriculum, hire faculty or staff, or make specific admissions decisions. The attorney general's actions constitute an unwarranted intrusion into the governance of state universities that strikes at the core of academic freedom and the important goal of promoting a free exchange of ideas.

The attorney general should not be allowed to turn back the clock on principles of equality, diversity, and academic freedom.

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Since 1974, SALT has been an independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-served individuals and communities. www.saltlaw.org