

DEPARTMENT OF JUSTICE

Washington, DC

June 15, 2016


**CERTIFICATION OF PUBLIC INTEREST WAIVER FOR VANITA GUPTA**

**FROM:** Lee J. Lofthus  
Designated Agency Ethics Official, Department of Justice

**SUBJECT:** Waiver from Restrictions Related to American Civil Liberties Union for *Students and Parents for Privacy v. U.S. Dep't of Education, et al.*

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee Vanita Gupta in the position of Principal Deputy Assistant Attorney General for the Civil Rights Division of the Department of Justice. Ms. Gupta shall not be restricted from participating in *Students and Parents for Privacy v. U.S. Dep't of Education, et al.*, subject to the limitations set forth in the attached memorandum and without waiving the limitation on Ms. Gupta's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Ms. Gupta's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed

  
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Lee J. Lofthus  
Designated Agency Ethics Official  
Department of Justice

Date 6/15/2016



U.S. Department of Justice

Justice Management Division

JUN 15 2016

Washington, D.C. 20530

MEMORANDUM FOR VANITA GUPTA  
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL  
FOR CIVIL RIGHTS

FROM: Lee J. Lofthus *Lee J. Lofthus 6/15/2016*  
Assistant Attorney General for Administration and Designated  
Agency Ethics Official

SUBJECT: Waiver under E.O. 13490 and Determination under 5 C.F.R. §  
2635.502

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standards of conduct on impartiality, 5 C.F.R. § 2635.502, that you may participate in a particular matter in which your former employer seeks to intervene on behalf of its clients.

On May 4, 2016, a group of parents in Illinois sued the Department of Justice (among other defendants) to challenge the legality of the Department's interpretation of "sex" discrimination under Title IX to include discrimination on the basis of transgender status. *See Students and Parents for Privacy, et al., v. U.S. Dep't of Education, et al.*, Case No. 1:16-cv-4945 (N.D. Ill.). On May 25, the American Civil Liberties Union (ACLU) moved to intervene as defendants on behalf of several students.

The Department of Justice (DOJ) has an important and vital role in protecting the civil rights of individuals, including gay and transgender individuals. DOJ also has an important role in ensuring that federal agencies' interpretative guidelines are given appropriate deference.

As has been noted in other recent cases, *Students and Parents for Privacy* raises issues that overlap substantially with those in at least six other pending lawsuits that directly implicate the Civil Rights Division's interests. Four have been filed in North Carolina. On May 9, 2016, the Civil Rights Division filed suit on behalf of the federal government in *United States v. North Carolina, et al.*, Case No. 1:16-cv-425 (M.D.N.C.), which challenges North Carolina's H.B. 2, a statute restricting transgender people from using the public restrooms that match their gender identity. The United States' lawsuit includes claims under Title IX, the same statute at issue in *Students and Parents for Privacy*. Similarly, North Carolina and certain state officials filed two separate lawsuits against the United States, DOJ, and the Attorney General and you, in your official capacities, regarding the federal government's response to H.B. 2. *See McCrory, et al., v. United States, et al.*, Case No. 5:16-cv-238 (E.D.N.C.); *Berger, et al., v. U.S. Dep't of Justice, et al.*, Case No. 5:16-cv-240 (E.D.N.C.). In addition, a group of parents and students recently filed a separate lawsuit raising similar claims against DOJ, the Department of Education, and the Attorney General and the Secretary of Education, in their official capacities. *See North Carolinians for Privacy v. U.S. Dep't of Justice, et al.*, No. 5:16-cv-245 (E.D.N.C.). To date, the

ACLU has not intervened in *United States v. North Carolina, McCrory, or North Carolinians for Privacy*. However, you were recently granted a waiver to participate in *Carcano, et al., v. McCrory, et al.*, No. 1:16-cv-236 (M.D.N.C.), an challenge by the ACLU and others that raises overlapping concerns with H.B. 2. Although a motion to consolidate the matters was recently denied at the district court level, whether and in what way the ACLU may involve itself in *United States v. North Carolina, McCrory, or North Carolinians for Privacy* is unknown at this point.

You also have received a waiver to participate in the *en banc* appeal of *G.G. ex rel. Grimm v. Gloucester County School Board*, Case No. 15-2056, -- F.3d --, 2016 WL 1567467 (4th Cir. April 19, 2016), in which the Fourth Circuit, holding that the Department of Education's interpretation of Title IX of the Education Amendments of 1972 was entitled to deference, ruled in favor of a transgender boy who had been prevented by the school district from using restrooms that correspond with his gender identity. Your involvement in *Student and Parents for Privacy* (which did not then include the ACLU), as part of the federal government's concerted response to challenges to our Title IX enforcement, was cited in support of that waiver. (Defendants' request for *en banc* reconsideration was recently denied; it is unknown whether defendants will appeal the Fourth Circuit's decision to the United States Supreme Court.) And on May 25, 11 states filed a lawsuit against the United States and others, including you in your official capacity, over the federal government's guidance on Title IX and Title VII as they relate to the treatment of transgender individuals. See *Texas, et al., v. United States, et al.*, Case No. 7:16-cv-00054 (N.D. Tex.). The ACLU is not now part of that lawsuit.

These cases raise issues related to the treatment of transgender individuals, by employers and by educators, and in various ways involve legislative, political, and judicial responses to guidance issued by DOE and DOJ. This rapidly developing area of law requires coordinated guidance from the highest levels of the Civil Rights Division and Department to ensure a clear, consistent, and well-considered message.

Immediately prior to your appointment on October 20, 2014, you served as a Deputy Legal Director at the national ACLU. Consequently, you are generally recused from participation in particular matters in which the ACLU<sup>1</sup> is or represents a party, under E.O. 13490. Further, we consider your participation under the impartiality standard of conduct, 5 C.F.R. § 2635.502, for the purpose of making a determination to authorize your participation in a particular matter with specific parties in which your former employer represents a party.

In light of H.B. 2, *Carcano, McCrory, Berger, North Carolinians for Privacy, G.G.*, and *Texas*, your continued participation in *Students and Parents for Privacy* is of great importance in

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<sup>1</sup> The ACLU has affiliate organizations in all 50 states; however, the affiliates are separate entities governed by independent boards of directors, and make decisions and act independently of actions taken by the national ACLU. Although not relevant here, we have previously determined that the national ACLU alone is Ms. Gupta's former employer, not any affiliate organization.

articulating and advocating the interests of the Civil Rights Division. Along with our responses in these other matters, our response in *Students and Parents for Privacy* will inform and be informed by our approach in those cases arising from our guidance on the interpretation of “sex” discrimination under Title IX. The issues presented in all these matters overlap and require a consistent response at the highest levels of the Department. Together, these matters are critical and may affect a number of the Division’s institutional interests, with ramifications beyond the context of transgender rights. Because of the potential impact of this case on the Division’s interests nationally, the Principal Deputy Assistant Attorney General, as the highest ranking official in the Division, should participate in the Department’s decision-making about the positions the government will take in this case.

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee’s former employer or former clients, including regulations and contracts. Sec. 1, ¶ 2. The Executive Order further provides that “particular matter involving specific parties” shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. § 2641.201(h), except that it shall also include “any meeting or other communication relating to the performance of one’s official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.” E.O. 13490, Sec. 2(h)

E.O. 13490 references the following definition provided in the standards of conduct (although the E.O. specifically includes regulations and contracts):

5 C.F.R. § 2641.201(h): Particular matter involving a specific party or parties – (1) Basic concept. The prohibition applies only to communications or appearances made in connection with a “particular matter involving a specific party or parties.” Although the statute defines “particular matter” broadly to include “any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding,” 18 U.S.C. § 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the

Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

The *Students and Parents for Privacy* case may determine whether restricting transgender individuals from using the bathrooms that correspond with their gender identity violates Title IX. One of the central issues in the lawsuit is whether federal prohibitions on sex discrimination cover discrimination based on gender identity, including whether such laws require covered entities to allow people to use single-sex restrooms consistent with their gender identity. You have been instrumental in developing the Department's position on these issues. For example, you are a co-signatory to a guidance document that DOJ and the Department of Education recently issued to advise state and local education officials that Title IX's prohibitions on sex discrimination require that students be allowed to use restrooms and locker rooms consistent with their gender identity. You also authorized the Division to file a statement of interest in 2015 in a Michigan lawsuit to support the Title IX and constitutional claims of a transgender boy who alleged that school officials barred him from using restrooms consistent with his male gender identity. You also submitted a recommendation to the Solicitor General's Office seeking authorization for the Division to file an amicus brief in an appeal challenging a university's refusal to allow a transgender student to use restrooms and locker rooms consistent with his gender identity. (That case settled before the Solicitor General decided whether to authorize amicus participation.) And you have made recommendations to, and been an active participant in discussions with, Department leadership on issues directly relevant to the North Carolina litigation, including whether the Equal Protection Clause and all federal statutes prohibiting sex discrimination should be interpreted to bar discrimination on the basis of gender identity and sexual orientation. Your experience and leadership on these issues would contribute immensely to the Division's and Department's discussions over presenting a consistent message on these issues.

Because the plaintiff's actions in *Students and Parents for Privacy* directly implicate the Division's enforcement responsibilities under federal laws prohibiting sex discrimination, it is important that the Division's senior official be able to participate in internal Department discussions and decisions concerning the Division's involvement in the case, as well as be able to serve as a public face of the Division in communicating with other stakeholders and the public concerning the Division's positions in this and similar cases.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. For the reasons discussed above, I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department; the important legal, policy, and strategic considerations; and your knowledge of the relevant issues presented. I certify that it is in the public interest that you be able to participate in the Division's involvement in *Students and Parents for Privacy v. U.S. Dep't of Education, et al.*



5 C.F.R. § 2635.502

The Standards of Conduct, 5 C.F.R. § 2635.501 *et seq.*, prohibit participation in matters that raise a question of an actual loss of impartiality or the appearance of loss of impartiality. Specifically, whenever an employee knows that a person with whom the employee has a “covered relationship” (which includes a former employer or former client) is a party, or represents a party in a specific matter, and where the circumstances would cause a reasonable person to question the employee’s impartiality under the appearance standard, the employee should not participate in the matter unless authorized to do so. 5 C.F.R. § 2635.502(a). An employee may participate in a specific party matter where it is determined that the interest of the government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the Department’s programs and operations. 5 C.F.R. § 2635.502(d).

An official has a covered relationship with a former employer for one year after employment terminates. You left the ACLU in October 2014, more than a year ago. You no longer have a covered relationship with the ACLU as defined by the regulation. The regulation also provides that, in other circumstances that would raise a question regarding an official’s impartiality, participation may be considered using the process in the regulation. In circumstances such as these, where a senior official who is subject to recusal under the provisions of the Ethics Pledge seeks to participate in a particular matter with specific parties, the Department has also made a determination whether to authorize participation using the criteria provided in the impartiality regulation.

The process for determining whether an employee should participate in a particular matter involving the appearance of a loss in impartiality is laid out at 5 C.F.R. § 2635.502(d). Under that process, I, as the agency designee, with the recommendation of an ethics official, must make a determination that the interest of the government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the Department’s programs and operations. In making this determination, I may consider such factors as: (1) the nature of the relationship involved; (2) the effect the resolution of the matter will have on the financial interest of the person involved in the matter; (3) the nature and importance of the employee’s role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter; (4) the sensitivity of the matter; (5) the difficulty of reassigning the matter; and (6) adjustments, if any, that are viable to reduce or eliminate the likelihood that a reasonable person will question the employee’s impartiality.

Using the above criteria, I conclude that you are authorized to participate as the PDAAG for Civil Rights in the Division’s defense in *Students and Parents for Privacy*. (1) You did not participate in this matter, which did not exist, while you served as Deputy Legal Director of the ACLU, and you have no client confidences regarding this case. (2) The ACLU is a non-profit entity and is seeking injunctive relief in this matter, not a financial settlement. The resolution of this case may have a minor effect on the financial interest on your former employer, the national ACLU. Specifically, in cases in which there is authority to seek payment for attorneys’ fees, the ACLU may seek reimbursement for such fees.

However, you have no continuing financial interest in the ACLU, and I do not consider the possible financial impact on the ACLU from a potential recovery of attorneys' fees to be a basis for a reasonable person to question your impartiality in advocating and supporting the government's interests where those interests may not be in accord with the interests of the ACLU's client. I note that the government's position on the basic questions presented in this case is already on the record in the Department's statement of interest and amicus brief filed in *G.G.* and the guidance on the treatment of transgendered individuals recently issued by the Departments of Justice and Education.

Further, (3 & 4) this case raises critically important issues related to the rights of transgender individuals and to the proper interpretation of federal law, and it is important that the Division's senior official be able to participate in internal Department discussions and deliberations concerning these issues. The matter is time sensitive in that the Department needs to decide soon how to respond to the plaintiffs' motion for a preliminary injunction and whether to file a motion to dismiss (and, if so, which arguments to raise), and those discussions must begin immediately. It is in the best interest of the government that you be authorized to participate as soon as practicable in the deliberations leading up to those decisions. As head of the Division, you bring a valuable perspective and judgment to the Division's participation in this sensitive case. However, other Department equities have an impact on the Department's ongoing participation in this case, and therefore you would not have unilateral decision-making authority regarding the Department's involvement. Rather, you would be one important voice among Department leadership considering the appropriate action to take in this matter. (5) You have valuable expertise and experience related to civil rights issues, and can bring this experience and expertise to bear both within the Department and in any communications with the public. Accordingly, I conclude that the Department's interest in your participation in *Students and Parents for Privacy* outweighs the possible concern that a reasonable person may question the integrity of the Department's programs and operations.

**WAIVER:** I hereby certify that it is in the public interest for you as Principal Deputy Assistant Attorney General to participate in the *Students and Parents for Privacy* case. As discussed above, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, the ACLU. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine, under 5 C.F.R. § 2635.502, that the interest of the Department in your participation in these cases outweighs any possible concern that a reasonable person may question the integrity of the Department's programs and operations