National Center for TRANSGENDER EQUALITY

March 28, 2016

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U.S. Department of Labor
200 Constitution Avenue N.W.
Room N-4123
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act (RIN 1291-AA36)

Dear Ms. Barry-Perez:

We appreciate this opportunity to provide comments in response to the Notice of Proposed Rulemaking regarding the Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act (WIOA). The National Center for Transgender Equality is one of the nation's leading social justice organizations advocating for life-saving change for transgender people. We applaud the efforts of the Department of Labor to ensure that all individuals, including lesbian, gay, bisexual and transgender (LGBT) individuals, have equal access to critical DOL programs that provide them with the training and skills fundamental to economic mobility and financial security. Our comments below highlight the strengths of the proposed rule and submit the recommendations below to further strengthen it.

§ 38.4(ff)(1)(i) Exclusion of Gender Dysphoria as Disability

We encourage the Department to remove the explicit exclusion of "transvestism, transsexualism, or gender dysphoria not resulting from physical impairments." The Americans with Disabilities Act currently has a similar exception from its definition of "disability,"[1] specifically excluding "[t]ransvestism, transsexualism…[and] gender identity disorders not resulting from physical impairments." Current medical science, however, strongly suggests that gender dysphoria has physiological or biological roots and thus "result[s] from physical impairments."[2] In a recent brief the Department of Justice took this position and argued that accordingly the ADA provision should not be read to exclude gender dysphoria from the statute:

[1] 42 U.S.C. § 12211(b)(1) (2008) (excluding "[t]ransvestism, transsexualism…[and] gender identity disorders not resulting from physical impairments" from the definition of "disability").
[2] Statement of Interest of the United States at 3-4, *Blatt v. Cabela*, No. 5:14-xc-4822-JFL (*filed* Nov. 16, 2015) (surveying medical research indicating that gender dysphoria has a physical basis).

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> In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms "disability" and "physical impairment" be read broadly, the [Gender Identity Disorder] Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.[3]

While the statutory language in the ADA on which § 38.4(ff)(1)(i) is based remains good law, reiterating that language in the Department of Labor's regulation in the absence of any identifiable factual scenario to which it would apply would only cause confusion, leading readers to believe that gender dysphoria is categorically excluded when it is not. Removing proposed § 38.4(ff)(1)(i) from the final rule would ensure that the rule reflects the functional impact of the ADA while avoiding uncertainty and misinterpretation. Alternatively, the Department could revise this section to clarify that gender dysphoria does not fall within the exclusion.

§ 38.7(a) Discrimination on the Basis of Sex

Discrimination Based on Gender Identity as Sex Discrimination

We support the proposed rule's recognition of the well-supported principle that "claims of gender identity discrimination, including discrimination grounded in stereotypes about how persons express their gender, are claims of sex discrimination under Title VII."[4] Numerous federal courts have interpreted Title VII and other federal sex discrimination laws to include discrimination on the basis of gender identity, gender transition, or transgender status.[5] In 2012, the Equal Employment Opportunity Commission followed these decisions and held that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII."[6] The EEOC explained its reasoning as follows:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether an employer discriminates against an

[3] *Id.* at 1.
[4] Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act, 81 Fed. Reg. 4494, 4499 (proposed Jan. 26, 2016) (to be codified at 29 C.F.R. pt. 38) [hereinafter Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA].
[5] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Rumble v. Fairview Health Serv.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Affordable Care Act); Fabian v. Hospital of Central Conn., No. 3:12-cv-1154, 2016 WL 1089178 (D. Conn. Mar. 18, 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard Cty., Md.,* 12 F.Supp. 3d 780 (D. Md. 2014). Older cases finding that Title VII does not protect transgender workers, *see, e.g. Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), reached their conclusions based on case law that has since been repudiated by the Supreme Court's holding in *Price Waterhouse v. Hopkins*, which determined that Title VII's prohibition on sex discrimination includes sex stereotyping. 490 U.S. 228 (1989). For an analysis of these cases, see Statement of Interest of the United States at *14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015).
[6] *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012).

> employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."[7]

The EEOC stressed that the conclusion that gender identity discrimination is covered can be reached by "any number of formulations"—as based on sex stereotypes about gender identity or expression or gender roles, as based on an outward change in sex, or as based on gender identity itself as a component of sex—all of which "are simply different ways of describing sex discrimination."[8] The Attorney General has reaffirmed this interpretation,[9] as has the Department of Labor itself.[10]

Similarly, the Departments of Education and Justice have clarified on multiple occasions that under Title IX discrimination based on gender identity and nonconformity to sex stereotypes is discrimination based on sex.[11] The Department of Health and Human Services has adopted a similar approach in its interpretation of Section 1557 of the Affordable Care Act, and has clarified that under the ACA discrimination based on sex includes discrimination on the basis of gender identity.[12] Numerous other federal agencies, including the Office of Special Counsel,[13]

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[7] *Id.* at *7.
[8] *Id.* at *10.
[9] Memorandum from Attorney General Eric Holder, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); *see also* Statement of Interest of the United States at *2, *Jamal*, No. 4:14-cv-02782; Statement of the United States, *Burnett v. City of Phila.,* No. 09-4348 (E.D. Pa. Apr. 4, 2014).
[10] Apprenticeship Programs; Equal Opportunity, 80 Fed. Reg. 68,908 (proposed Nov. 6, 2015) (to be codified at 29 C.F.R. pts. 29-30); Discrimination on the Basis of Sex, 80 Fed. Reg. 5246 (proposed Jan. 30, 2015) (to be codified at 41 C.F.R. pt. 60); Office of Fed. Contract Compliance Programs (OFCCP) Dir. 2015-1, Handling Individual and Systemic Sexual Orientation and Gender Identity Discrimination Complaints (Apr. 16, 2015); OFCCP Dir. 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014).
[11] Finding Letter from Adele Rapport, Director of Chicago Regional Office of Office for Civil Rights of U.S. Department of Education, to Daniel E. Cates, Superintendent of Township High School District 211 (Nov. 2, 2015); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015); Statement of Interest of the United States, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, (E.D. Va. June 29, 2015); Statement of Interest of the United States, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015); Dep't of Educ., *Title IX Resource Guide*, 1 (Apr. 2015); Dep't of Educ., "Questions and Answers on Title IX and Sexual Violence," 5 (Apr. 29, 2014). *See also* Dep't of Educ., "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," 25 (Dec. 1, 2014); Dep't of Educ., "Dear Colleague," 7-8 (Oct. 26, 2010).
[12] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).
[13] *See* Report of Prohibited Personnel Practice, Office of Special Counsel File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014).

the Office of Personnel Management,[14] and the Department of Housing and Urban Development,[15] have taken the same position in guidance, proposed or final regulations, and adjudications.

Sexual Orientation Discrimination as Unlawful Sex Discrimination

In accordance with the position of the EEOC and federal courts, we urge the Department to include the same explicit recognition in the final rule that sexual orientation discrimination constitutes unlawful sex discrimination. Explicitly incorporating sexual orientation into the definition of sex in the final rule is both well-supported by established legal principles and essential to ensuring that lesbian, gay and bisexual (LGB) individuals have equal access to WIOA-funded services and programs.

As the proposed rule recognized, the Department "defers to the EEOC's interpretations of Title VII law as it applies to applicants and employees of employers receiving WIOA Title I financial assistance."[16] This deference should extend to the EEOC's unambiguous position that discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII. For example, the EEOC held this past summer that Title VII's prohibition on employment decisions based on "sex-based considerations" includes considerations based on an individual's sexual orientation.[17] The Commission clearly stated that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."[18] The EEOC further clarified that "[a] complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account."[19]

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[14] *See* 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105; Office of Personnel Mgmt. et al., *Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities* (2015).

[15] Memorandum from John Trasviña to FHEO Regional Directors, *Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression* (June 2010); *Dep't of Hous. & Urban Dev. v. Toone*, Charge of Discrimination, FHEO Nos. 06-12-1130-8; 06-121363-8 (Aug. 15, 2013); Dep't of Hous. & Urban Dev., *Equal Access for Transgender People: Supporting Inclusive Housing and Shelters* (Mar. 2016), https://www.hudexchange.info/resources/documents/Equal-Access-for-Transgender-People-Supporting-Inclusive-Housing-and-Shelters.pdf.

[16] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4497.

[17] *Baldwin v. Foxx*, E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to *Baldwin*. *See*, *e.g.*, *Complainant v. Johnson*, E.E.O.C. Appeal No. 0120110576 (Aug. 20, 2014); *Complainant v. Cordray*, E.E.O.C. Appeal No. 0120141108 (Dec. 18, 2014); *Complainant v. Donahoe*, E.E.O.C. Appeal No. 0120132452 (Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, E.E.O.C. Appeal No. 0120110145 (Oct. 23, 2014); *Couch v. Dep't of Energy*, E.E.O.C. Appeal No. 0120131136 (Aug. 13, 2013); *Brooker v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120112085 (May 20, 2013); *Culp v. Dep't of Homeland Sec.*, E.E.O.C. Appeal No. 0720130012 (May 7, 2013); *Castello v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120111795 (Dec. 20, 2011); *Veretto v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120110873 (July 1, 2011).

[18] *Baldwin,* E.E.O.C. Appeal No. 0120133080 at *5.

[19] *Id*.

In January of this year, the EEOC also filed a brief in support of a former security officer who alleged that she was unlawfully targeted for termination because of her sexual orientation.[20] The EEOC's brief presents the Commission's clear and consistent policy regarding sexual orientation discrimination stating:

> Title VII's prohibition on sex discrimination encompasses a prohibition on sexual orientation discrimination. This interpretation is most consistent with the statutory language prohibiting employment discrimination 'because of…sex.' It also flows naturally from binding precedent because sexual orientation discrimination (1) relies on illegal sex stereotyping, (2) constitutes gender-based associational discrimination, and (3) involves impermissible sex-based considerations.[21]

The EEOC took the same position in *Cote v. Wal-Mart*, where it found that the refusal to enroll an employee's same- sex spouse in employer-sponsored health care benefits constituted sex discrimination under Title VII.[22] Most recently, in March 2016, the EEOC filed Title VII sex discrimination lawsuits in two cases where employees were subjected to harassment based on their sexual orientation.[23]

Some older federal decisions held that sexual orientation discrimination is not actionable under existing sex discrimination laws; however, those decisions are based on outmoded rationales that cannot be reconciled with the U.S. Supreme Court's contemporary sex discrimination jurisprudence. As a recent federal court rejecting these precedents asserted, many of these decisions were based on a "cursory and conclusory" statement that sex discrimination laws did not apply to discrimination based on sexual orientation[24] and rested on an "illusory and artificial" distinction between sex stereotyping and sexual orientation.[25] To the extent these decisions include any analysis at all, they reason that the 88th Congress did not intend to protect gay, lesbian, and bisexual people when it enacted Title VII—the same logic employed by courts holding Title VII does not cover bias based on gender identity.[26] These decisions assumed that Congress had only the "traditional notions of sex in mind" when it passed Title VII and that those "traditional notions" did not include sexual orientation.[27] However, the Supreme Court rejected this mode of statutory interpretation in *Oncale v. Sundowner Offshore Services, Inc.*,

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[20] Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and Reversal, *Evans v. Georgia Reg'l Hosp.*, No. 15-15234 (11th Cir. *filed* Jan. 11, 2016).
[21] *Id.* at *21 (citation omitted).
[22] EEOC Charge No. 523-2014-00916 (Jan. 29, 2015).
[23] Complaint at 3-4, *EEOC v. Scott Med. Health Ctr.,* No. 2:16-cv-00225-CB (W.D. Pa. *filed* Mar.1, 2016) (alleging that an employee who was subjected to anti-gay epithets was "necessarily" treated "less favorably because of his sex" and nonconformity to sex stereotypes); Complaint at 3-5, *EEOC v. Pallet Co., d/b/a IFCO Systems NA* (alleging the same for an employee who faced harassment based on her sexual orientation).
[24] *See, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (*quoting Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)) (asserting without discussion that "Title VII does not prohibit harassment or discrimination because of sexual orientation"); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).
[25] *Videckis v. Pepperdine Univ.*, --- F.Supp.3d ---, No. 2:15-cv-00298, 12, 14 (C.D. Cal Dec. 14, 2015).
[26] *See, e.g.*, *DeSantis v. Pacific Tel. & Tel. Co.,* 608 F.2d 327 (9th Cir. 1979)*, abrogated by Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).
[27] *Id.* at 329.

unanimously holding that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[28]

Just as *Oncale* held that Title VII must be applied to prohibit sexual harassment of men by other men, even though Congress did not have that problem in mind when it enacted Title VII,[29] so Title VII must be applied to prohibit discrimination based on sexual orientation, an intrinsically sex-based characteristic, regardless of whether Congress expressly intended for that outcome at the time of enactment. Interpreting Title VII to exclude coverage of discrimination based on sexual orientation violates this principle by inserting a judicially crafted exception into the plain language and reasonable application of the text. Some decisions declining to apply Title VII to sexual orientation have gone further and suggested that Congress affirmatively intended to exclude sexual orientation, citing Congress's failure to pass legislation expressly prohibiting sexual orientation discrimination in the workplace.[30] The Supreme Court has ruled, however, that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[31]

The EEOC's decision in *Baldwin* and other cases, already recognized as "persuasive[]" and "compelling" by one district court,[32] reflects a steady, consistent development of case law that rejects these older decisions and reaffirms that discrimination on the basis of sexual orientation is a form of sex discrimination. For example, in 2002, a federal court clearly stated that an employer is engaged in unlawful discrimination if the employee would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.[33] The trend towards recognizing sexual orientation discrimination as sex discrimination is further illustrated in *Muhammad v. Caterpillar*, where the Seventh Circuit initially ruled against a plaintiff alleging workplace harassment based on his sexual orientation on the grounds that Title VII did not apply to sexual orientation discrimination.[34] Upon a motion for a panel rehearing, the circuit court,

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[28] 523 U.S. 75, 79 (1998).
[29] *Id.* at 80-81.
[30] *See, e.g.*, *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton*, 232 F.3d at 35-36.
[31] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).
[32] *Isaacs v. Felder Serv., LLC*, No. 2:13-cv-693–MHT, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015); *see also Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 486 (Mo. App., W.D. Oct. 27, 2015) (Gabbert, J., dissenting).
[33] *Heller v. Columbia Edgewater Country Club*, 195 F.Supp. 2d 1212, 1223-24 (D. Or. 2002). *See also Koren v. Ohio Bell Tel. Co.*, 894 F.Supp. 2d 1032 (N.D. Ohio 2012) (discrimination based on sex stereotype that man should not take a male spouse's surname is sex-based under Title VII); *Centola v. Potter*, 183 F.Supp. 2d 403, 410 (D. Mass. 2002) ("The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, 'real men don;t date men.' The gender stereotype at work here is that 'real' men should date women, and not other men.") *Hall v. BNSF Ry. Co.* 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (employees who were denied same-sex spousal coverage under the company health plan stated plausible Title VII sex discrimination claim).
[34] 767 F.3d 694 (7th Cir. 2014).

significantly, chose to amend its opinion to remove the erroneous statement that Title VII did not extend to sexual orientation and upheld its earlier decision on other grounds.[35]

Courts have similarly held that discrimination against same-sex couples is sex-based discrimination under the Equal Protection Clause of the Constitution.[36] Most directly, the federal district court for the District of Columbia has held that an allegation that an employee's "orientation as homosexual had removed him from [the employer's] preconceived definition of male" stated a Title VII claim.[37] Courts have held similarly in cases of sexual orientation-based harassment under Title IX.[38] In one recent Title IX ruling, the district court noted that other courts had struggled to distinguish between "covered" sex discrimination claims and "non-covered" sexual orientation claims, concluding, "Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct."[39]

Consistent with the interpretation of the EEOC and federal courts, as well as the Department's deference to the EEOC on the interpretation of Title VII, we urge the Department to define sex in § 38.7(a) to include sexual orientation.

We further recommend that the Department clarify that discrimination on the basis of sex stereotypes includes adverse treatment based on an individual's sexual orientation. Specifically, we recommend that the Department incorporate language consistent with its January 2015 proposed sex discrimination rule, which stated that employment decisions made on the basis of sex stereotypes include "adverse treatment of an employee because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex."[40] Including similar language in the proposed rule implementing WIOA would not only reflect federal case law and EEOC policy, but would also provide much-needed consistency and clarity across departmental programs.

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[35] *Id.* at 697 (upholding earlier decision on the grounds that the employer was not liable for the harassment).
[36] *See, e.g., Latta v. Otter*, 771 F.3d 456, 480-96 (9th Cir. 2014) (Berzon, J., concurring); *Waters v. Ricketts*, 48 F.Supp. 3d 1271, 1281 (D. Neb. 2015); *Rosenbrah v. Daugaard*, 61 F.Supp. 3d 845, 860-61 (D.S.D. 2014); *Jernigan v. Crane*, 64 F.Supp. 3d 1260, 1286 (E.D. Ark. 2014); *Perry v. Schwarzenegger*, 704 F.Supp. 2d 921, 996 (N.D. Cal. 2010); *Lawson v. Kelly*, 14–0622–cv–W–ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014); *Kitchen v. Herbert*, 961 F.Supp. 2d 1181, 1206 (D. Utah 2013); *see also Baehr v. Lewin*, 852 P.2d 44, 64-67 (Haw. 1993) (plurality opinion); *Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 971-73 (Mass. 2003) (Greaney, J., concurring).
[37] *Terveer v. Billington*, 34 F.Supp. 3d 100, 116 (D.D.C. 2014). *See also Boutillier v. Hartford Pub. Sch.*, 2014 WL 4794527 (D. Conn. 2014) (plaintiff stated Title VII harassment claim by alleging she was "subjected to sexual stereotyping during her employment on the basis of her sexual orientation").
[38] *Estate of Brown v. Ogletree*, 2012 WL 591190 at *16-17 (S.D. Tex. Feb. 21, 2012), *modified on other grounds by Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 2012 WL 1900929 (S.D. Tex. May 23, 2012); *Schroeder v. Maumee Bd. Of Educ.*, 296 F.Supp. 2d 869, 871 (N.D. Ohio 2003); *Ray v. Antioch Unified Sch. Dist.,* 107 F.Supp. 2d 1165, 1170 (N. D. Cal.2000); *see also* Letter of Findings to Tehatchapi Unified School District, ED/OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38, at 14. (June 30, 2011).
[39] *Videckis*, --- F.Supp.3d ---, 2015 WL 8916764, at *6 (*quoting Prowel v. Wise Bus. Forms, Inc*., 579 F.3d 285, 291 (3d Cir. 2009)). *See also* Christiansen v. Omnicom Group, Inc. et al., --- F.Supp.3d ---, No. 1:15-cv-03440-KPF (S.D.N.Y. Mar. 9, 2016) (describing "the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping").
[40] Discrimination on the Basis of Sex, 80 Fed. Reg. at 5279.

§ 38.7(b) Prohibited Discriminatory Sex-Based Conduct

Equal Access to Workplace Facilities

We applaud the Department for its recognition that denying access to facilities consistent with an employee's gender identity because of their transgender status is a form of sex discrimination. Proposed § 38.7(b)(9) is consistent with the EEOC's established application of Title VII requiring employers to treat individuals according to their gender identity, including by ensuring equal access to gender-specific facilities.[41] The Department of Labor has reaffirmed this interpretation in guidance for the Job Corps programs[42] and other employment and training programs,[43] and in proposed sex discrimination rules for federal contractors.[44] Numerous other agencies have acknowledged this basic principle of nondiscrimination with respect to a wide range of other settings, including school restrooms and locker rooms,[45] dormitories,[46] health care facilities,[47] and shelters.[48] To date, at least 13 states and the District of Columbia have, by regulations, guidance, case law, or specific statutory language, clarified that state laws prohibiting gender identity discrimination require that transgender individuals have access to sex-segregated facilities consistent with their gender identity.[49] Additionally, courts have rejected

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[41] *See*, *e.g.*, *Lusardi*, E.E.O.C. App. No. 0120133395, at *15.

[e] Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015).

[43] Dep't of Labor, Training and Employment Guidance Letter No. 37-14, The Workforce Development System: Training and Employment Guidance Letter on Gender Identity, Gender Expression and Sex Stereotyping (May 29, 2015), http://wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14_Acc.pdf; Dep't of Labor, *DOL Policies on Gender Identity: Rights and Responsibilities* (July 2013), http://www.dol.gov/oasam/programs/crc/20130712GenderIdentity.htm#_ftn3.

[44] Discrimination on the Basis of Sex, 80 Fed. Reg. at 5277.

[45] *See*, *e.g.*, Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G.* ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, (4th Cir. Oct. 28, 2015); Statement of Interest of the United States at 5, *G.G.* ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54 (E.D. Va. June 29, 2015); *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 215); Resolution Agreement between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013); Resolution Agreement between the Downey Unified School District and the U.S. Department of Education, Office for Civil Rights (OCR Case No. 09-12-1095 Oct. 8, 2014).

[46] Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, *supra* note 42.

[47] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54,219; Dep't of Health & Human Servs., Office for Civil Rights, Bulletin: The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (July 14, 2015).

[48] Dep't of Justice, Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013, at 9 (Apr. 9, 2013); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 80 Fed. Reg. 72,542 (proposed Nov. 20, 2015) (to be codified at 24 C.F.R. pt. 5).

[49] *See* CAL. EDUC. CODE § 221.5(f); N.J. STAT. ANN. § 10:5-12(f)(1); 3 COLO. CODE REGS. § 708-1:81.11; D.C. MUN. REGS. tit. 4, § 802.1; OR. ADMIN. R. 839-005-0031(2) (2014); WASH. ADMIN. CODE § 162-32-060 (2015); *Dep't of Fair Emp't & Hous. v. Am. Pac. Corp.*, Case No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. Mar. 13, 2014); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, Determination (Colo. Div. of Civil Rights Jun. 18 2013); *Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011CN2993/2011CP2994 (Ill. Human Rights. Comm'n, May 15, 2015); *Jones v. Johnson Cty. Sheriff's Dep't*, CP No. 12-11-61830, Finding of Probable Cause (Iowa Civil Rights. Comm'n Feb. 11, 2013); Conn. Safe

claims that a third party's discomfort with the presence of a transgender person in a sex-specific facility implicates any legally cognizable right.[50]

Despite this widespread recognition, many employers and training program staff continue to misinterpret their obligations under sex discrimination laws, and frequently deny transgender people access to appropriate restrooms.[51] Proposed §38.7(b)(9) is essential for preventing this harmful and discriminatory practice in WIOA-funded programs, and we urge the Department to incorporate it into its final rule.

We recommend that the Department make several minor changes to the language of § 38.7 to clarify the scope of its protections. First, we urge the Department to clarify that WIOA-funded programs cannot deny individuals access to any gender-specific facilities and activities (rather than only bathrooms), including changing facilities, when those facilities are consistent with their gender identity. Sex nondiscrimination laws provide no basis for distinguishing between different types or layouts of gender-specific facilities or restricting transgender individuals' access to certain facilities. This principle has been routinely recognized by government agencies, which have made clear that transgender individuals must be given equal access to a full range of gender-specific settings.[52]

Sch. Coal., Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 8 (2012), http://www.sde.ct.gov/sde/lib/sde/pdf/equity/title_ix/guidelines_for_schools_on_gender_identity_and_expression2012oct4.pdf; Iowa Civil Rights Comm'n, Guidance on Sexual Orientation & Gender Identity: A Housing Provider's Guide to Iowa Law Compliance (2012), https://icrc.iowa.gov/sites/files/civil_rights/publications/2012/SOGIEmpl.pdf; Mass. Dep't of Elementary and Secondary Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity* 9-10 (2013), http://www.doe.mass.edu/ssce/GenderIdentity.pdf; Nev. Equal Rights Comm'n, Facts About Gender Identity or Expression Discrimination (2012), http://detr.state.nv.us/Nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf; New York State Educ. Dep't, Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students (2015), http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf; Vt. Human Rights Comm'n, Sex, Sexual Orientation and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees (2012), http://hrc.vermont.gov/sites/hrc/files/publications/trans-employment-brochure.pdf.

[50] *See Cruzan v. Special Sch. Dist.*, #1, 294 F.3d 981 (8th Cir. 2002) (rejecting as insufficient teacher's assertion that her "personal privacy" was invaded when school permitted transgender woman to use women's room); *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (non-transgender female prisoner's objection to sharing a cell with a transgender woman implicated no clearly established right); *see also* Nedda Reghabi, *A Balancing Act for Businesses: Transsexual Employees, Other Employees, and Customers*, 43 ARIZ. ST. L.J. 1047 (2011) (concluding invasion-of-privacy claims by customers offended by transgender employees' use of appropriate restrooms would also likely fail for lack of actual harm).

[51] *Cf.* Nat'l. LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 56 (2011), http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf. (Twenty-two percent of respondents in a national study of transgender individuals reported that they had been denied access to restrooms consistent with their gender identity in the workplace.).

[52] *See supra*, notes 41–48. *See also Lusardi*, E.E.O.C. App. No. 0120133395, at *13, n. 7 (observing that depriving the complainant of locker and shower room access in addition to restroom access "constituted a material employment disadvantage").

We also recommend that the Department make minor changes to the proposed regulatory language in order to permit individuals to access facilities that are consistent with their gender identity, rather than the facilities "used by the gender with which they identify." Based on this revised language, the Department should clarify in the preamble that WIOA-funded programs are required to ensure that individuals whose genders are non-binary can access facilities that are most consistent with their gender identity; many individuals with non-binary genders can commonly identify which is more consistent with their gender when faced with a choice between male- and female-specific programs or facilities.

Finally, we encourage the Department to clarify that while programs are authorized to provide sex-segregated locker rooms and bathrooms, they are not required to. While most programs will likely continue to segregate their multi-user facilities by gender, requiring them to do so unnecessarily eliminates their control and flexibility in determining the best layout for each facility on a case-by-case basis and offering unisex facilities in appropriate contexts.

Ensuring Treatment Consistent with Individuals' Gender Identities

We appreciate the Department's inclusion of a provision that would prohibit "treating an individual adversely" based on their transgender status. We believe that adverse treatment necessarily includes the failure to treat individuals according to their gender identity, including deliberately and repeatedly referring to them by a name or pronoun that is inconsistent with their gender identity, prohibiting them from dressing in a manner consistent with their gender, and, as discussed above, denying them equal access to workplace facilities. We are concerned, however, that it may not be clear to all WIOA-funded program staff that such conduct is prohibited by the Department's proposed regulation, and therefore urge the Department to clarify that refusing to treat an individual according to their gender identity constitutes sex discrimination, and as well as to include specific examples of prohibited conduct.

The EEOC has made clear that the failure to treat an employee consistent with their gender identity is prohibited under Title VII, and that such conduct includes the refusal to process a name change for a transgender employee[53] and the "persistent failure to use [an] employee's correct name and pronoun."[54] Transgender and gender nonconforming employees have the right to be addressed by the name and pronoun corresponding to their gender identity or gender

[53] *Complainant v. Dep't of Veterans Affairs*, E.E.O.C. Appeal No. 0120133123 (Apr. 16, 2014). *See also* Consent Decree, *Deluxe Fin. Servs. Corp.,* No. 0:15-cv-02646-ADM-SER, at *10.

[54] *Lusardi*, E.E.O.C. App. No. 0120133395, at *15. *See also Jameson v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120130992, 2 (May 21, 2013) ("[S]upervisors and coworkers should use the name and pronoun of the gender that the employee identifies with…. Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."); Complaint, *EEOC v. Deluxe Fin. Servs. Corp.,* No. 0:15-cv-02646-ADM-SER, at *14 (alleging discrimination when co-workers and supervisors "subjected [complainant] to gender-based derogatory comments about her appearance, intentionally referred to her with male pronouns, and called her insulting names"); Office of Personnel Mgmt., *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* (2011), https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance.("Continued misuse [of a transitioning employee's] new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers is contrary to the goal of treating transitioning employees with dignity and respect, and creates an unwelcoming work environment.").

expression. Unfortunately, in a 2011 national survey, 45 percent of transgender workers reported that they had been referred to by the wrong gender pronouns, repeatedly and on purpose.[55] As the EEOC has recognized, the deliberate and repeated use of a name and pronouns associated with a transgender employee's assigned sex at birth is "demeaning" and amounts to a refusal to recognize the validity of their gender.[56] This is consistent with the Department of Labor's internal gender identity policy, which requires managers to "[r]efer to each person by the name, and the gender-specific pronoun, by which the person wants to be called."[57] By explicitly clarifying that sex discrimination includes the refusal to treat individuals consistent with their gender identity, the Department can ensure that program participants are protected from this pervasive and harmful mistreatment.

Discrimination on the Basis of Pregnancy

We commend the Department for rectifying the regulations' current omission of pregnancy discrimination as a form of sex discrimination by explicitly clarifying in proposed §38.7 that sex includes "pregnancy, childbirth, and related medical conditions." This addition brings the proposed rule in line with current law, which, since the 1970s, has explicitly included pregnancy discrimination as sex-based discrimination under the protections of Title VII[58] and Title IX.[59] While we commend the Department for including discrimination on the basis of pregnancy as an example of unlawful sex-based discriminatory practices in proposed § 38.7(b)(7), the pregnancy discrimination example proposed does not illustrate the full scope of unlawful pregnancy discrimination. Accordingly, we urge the Department to clarify that sex discrimination includes "[d]enying individuals who are pregnant, who become pregnant, who plan to become pregnant, *or who are of childbearing capacity* opportunities for or access to aid, benefit, service, or training on the basis of pregnancy, *childbirth, or related medical conditions, including childbearing capacity*." Such additions will ensure that the rule is aligned with the EEOC guidance on pregnancy and pregnancy-related conditions,[60] and with Department of Labor regulations addressing sex discrimination in other contexts.[61]

For the same reasons, we also encourage the Department to strengthen the regulations by adding in proposed § 38.7(b)(7), or in a separate subsection, that sex-based discriminatory practices would also include "[f]ailing to provide individuals who are pregnant reasonable accommodations related to pregnancy or pregnancy-related medical conditions, where such accommodations are provided to or required to be provided to other program participants similar in their ability or inability to work."

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[55] Nat'l LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *supra* note 51, at 56.
[56] *Lusardi*, E.E.O.C. App. No. 0120133395, at *15.
[57] Dep't of Labor, *DOL Policies on Gender Identity: Rights and Responsibilities*, *supra* note 43 (emphasis omitted). Other agencies, such as the Office of Personnel Management, are in accord with this position. *See* Office of Personnel Mgmt., *supra* note 54.
[58] 42 U.S.C. § 2000(e)(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions….").
[59] Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified at 20 U.S.C. §§1681-1688); 34 C.F.R. 106.40(a).
[60] Office of Legal Counsel, Equal Emp't Opportunity Comm'n, Notice No. 915.003, *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, (2015).
[61] Discrimination on the Basis of Sex, 80 Fed. Reg. at 5278.

38.7(d) Discrimination Against Victims of Domestic Violence

We applaud the Department's recognition that protection from sex discrimination includes protection for individuals who are victims of domestic violence who may be eligible for, or participate in, WIOA programs. Domestic violence is widespread[62] and negatively impacts victims' employment and employment opportunities. Approximately one in five transgender people have faced violence at the hands of family member specifically due to their transgender status or gender non-conformity, and the full extent of domestic violence against transgender individuals is undoubtedly greater.[63] Employment is a significant factor in helping victims stay safe and support a family while they separate from a perpetrator, seek justice, and obtain health care and other forms of assistance. However many victims lose their jobs or employment opportunities because of discrimination.

Currently no federal law specifically prohibits discrimination against victims. However, survivors and their advocates have pursued and in some cases obtained redress under existing federal anti-discrimination laws.[64] As acknowledged in the proposed regulations, in October 2012, the EEOC issued a fact sheet explaining how Title VII of the Civil Rights Act of 1964 and the ADA could apply to employment issues involving victims of domestic and sexual violence.[65]

In October 2012, the EEOC issued a fact sheet explaining how Title VII and the ADA could apply to employment issues involving victims of domestic and sexual violence. Some victims have pursued and obtained redress under Title VII. California, Connecticut, Delaware, Hawaii, Illinois, New York, and Oregon have enacted laws that specifically prohibit employment

[62] Ctrs. for Disease Control & Prevention, *The National Intimate Partner and Sexual Violence Survey* (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

[63] Nat'l LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *supra* note 51, at 100. Transgender people of color and low-income transgender people face disproportionately high rates of domestic violence. *Id*.

[64] Over the years, courts have recognized Title VII sex discrimination claims, including sexual harassment, by plaintiffs who were victims of domestic violence and/or sexual assault. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (finding hostile work environment claim where plaintiff had been sexually assaulted by her co-worker); *Crowley v. LL Bean, Inc.*, 303 F.3d 387 (1st Cir. 2002) (upholding jury verdict on hostile work environment claim and systemic sex discrimination claim where plaintiff was stalked and harassed by co-worker, who was fired only after she obtained an order of protection); *Excel Corp. v. Bosley,* 265 F.3d 365 (9th Cir. 1999) (affirming jury's award on sexual harassment and disparate treatment claims, where husband sexually harassed wife, a co-worker, after they separated); *Fuller v. City of Oakland*, 41 F.3d 1522 (9th Cir. 1995) (finding successful hostile work environment sexual harassment claim where police officer who ended romantic relationship with fellow officer was stalked and harassed by him, and employer failed to adequately address the situation); *Rohde v. K.O. Steel Castings Inc.,* 649 F.2d 317 (5th Cir. Unit A 1981) (finding Title VII disparate treatment claim successful where plaintiff, who was physically assaulted by co-worker with whom she was in a relationship, was fired where the male employee who assaulted her was not); *Valdez v. Truss Components, Inc.,* No. CV98-1310-RE, 1999 U.S. Dist. LEXIS. 22957 (D. Or. Aug. 19, 1999) (denying summary judgment on disparate treatment claim where plaintiff who dated co-worker and was stalked and threatened by him was fired).

[65] U.S. Equal Emp't Opportunity Comm., *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking* (2012), http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm.

discrimination against victims of violence.[66] But this still leaves the vast majority of workers who experience domestic violence unprotected from discriminatory practices based on the fact that they are victims. The Department's recognition in a federal regulationy that domestic violence can impact an individual's employment and ability to access and benefit from WIOA programs will enhance survivors' safety and economic security.

Because the area of discrimination against victims of domestic violence is an emerging area of law and practice, we believe program administrators and program participants would benefit from additional illustrative examples and discussion of this issue. For instance, we urge the Department to include examples of how sex discrimination or sex stereotyping can manifest when both the victim and the abusive partner access or participate in the same WIOA program or activity.

38.7(d)(9) Sex Stereotyping and Occupational Segregation

We strongly commend the Department for explicitly recognizing sex stereotyping as sex discrimination. Outdated assumptions about women not being breadwinners in their families and about who should be responsible for family caregiving contribute to occupational gender segregation, as do assumptions about the work that interests women and the work women are qualified to do. Unfortunately, federal workforce development programs have also been shown to reinforce occupational segregation. Nearly 48 percent of women receive training services for "sales and clerical" or "service" jobs, compared to 14.6 percent of men.[67] By contrast, 6 percent of women receive training in "installation, repair, production, transportation, or material moving," or "farming, fishing, forestry, construction, and extraction" skills, compared to 52.6 percent of men.[68] This occupational segregation negatively impacts women's earnings. In fact, wages in occupations that are predominantly female pay low wages[69] precisely because women are the majority of workers in the occupation.[70] It is thus not surprising that women who exit the workforce development system make 74.6 cents to every dollar made by men exiting the system.[71]

While research conducted on occupational training and counseling decisions of low-income women found that "women who said they would be interested in nontraditional training significantly outnumbered women who were actually referred to such training."[72] The research showed that many counselors were unlikely to proactively suggest alternative programs that

[66] *See* Cal. Lab. Code §§ 230 & 230.1; Conn. Gen. Stat. § 31-51ss; Del. Code Title 19 § 711(h); Haw. Rev. Stat. § 378-2; 820 Ill. Comp. Stat. 180/30; N.Y. Exec. L. § 296-1(a); Ore. Rev. Stat. §659A.290(2).
[67] Institute for Women's Policy Research, *Workforce Investment System Reinforces Occupational Gender Segregation and the Gender Wage Gap* (June 2013), http://www.iwpr.org/publications/pubs/workforce-investment-system-reinforces-occupational-gender-segregation-and-the-gender-wage-gap.
[68] *Id.*
[69] Nat'l Women's Law Ctr., *The 10 Largest Jobs Paying Under $10.10/Hour are Majority Women* (2013), http://www.nwlc.org/sites/default/files/pdfs/womendominatedminwageoccupations.pdf.
[70] Philip N. Cohen, *Devaluing and Revaluing Women's Work* (May 25, 2011), http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.
[71] Institute for Women's Policy Research, *supra* note 67.
[72] *Id.*

might lead to higher earnings.[73] Many of the women surveyed said they might have pursued training for different occupations had they seen more detailed information about potential earnings and benefits.[74]

Accordingly, we strongly support the example in proposed § 38.7(d)(9) of discrimination against an individual because the individual "does not conform to a sex stereotype about individuals of a particular sex working in a specific job, sector, or industry." Given the severity of occupational segregation in WIOA programs, we urge the Department to specifically recognize in the preamble to the final rule the stark gender segregation in the jobs for which women and men receive training. Since lack of information about nontraditional training opportunities has been identified as a significant reason for occupational segregation in workforce development programs, it is particularly important to include, as an example of discriminatory sex stereotyping, failing to provide information about services or training opportunities in the full range of services and opportunities offered by the recipient. Relatedly, we urge the Department to require minimum affirmative outreach in § 38.40 to include providing all applicants and program participants information, including wages and benefits, about the full range of employment opportunities offered by the program.[75]

Workplace Discrimination Based on Disability

According to the Bureau of Labor Statistics, less than 20% of people with disabilities are employed[76] Out of those who are employed, an estimated 400,000 are working in sheltered workshops and being paid at less than minimum wage, in some cases earning as low as 50 cents per hour.[77] There is a critical need to ensure that young people with disabilities and their families have the information and experiences that allow them to aim to obtain work in competitive integrated settings. While maximizing opportunities for competitive integrated employment among individuals with disabilities was one of the central purposes of WIOA, the goal of competitive integrated employment is not mentioned in the nondiscrimination regulations. It is critical that the nondiscrimination mandates in this proposed rule require that covered entities provide people with disabilities equal opportunity to access competitive integrated employment and protect the rights of people with disabilities to receive a fair income comparable to that of other employees, be employed in settings that include people with and without disabilities rather than limited to segregated facilities, and access opportunities for advancement that are comparable to those of their non-disabled peers.

We also urge the Department to include examples of how some of the non-discrimination provisions apply in the context of WIOA Title-I funded entities. For example, providing reasonable accommodations to individuals with disabilities means that American Job Centers

[73] *Id.*
[74] *Id.*
[75] *See* Statewide Nontraditional Leadership Team and Gender Equity Advisory Comm. & Illinois State Bd. of Educ., *Equitable Access to Employment Services: How Are Women In Illinois Being Served* (2002) (recommending disseminating labor market information regarding nontraditional jobs (and their wages) to all female clients).
[76]Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics Summary* (June 2015).
[77] Nat'l Disability Rights Network, Beyond Segregated and Exploited: Update on the Employment of People with Disabilities 4 (2012).

must, among other things, use accessible language where necessary to ensure that a person with an intellectual disability can fully participate in and benefit from Job Center services, programs and activities, and must use effective engagement strategies when needed to ensure full participation and benefit for a person with cognitive or psychiatric disabilities.

We generally support the definition of programmatic accessibility in 38.13(b), but we believe that there are additional critical elements that must be referenced within the proposed regulation in order to ensure the successful implementation of programmatic accessibility, such as:

- Effective notice to individuals with disabilities of their right to programmatic accessibility, including verbal offers to provide information concerning this right in an alternative format such as large font text, Braille or electronic disc, or in appropriate language translations needed by LEP individuals;
- Ongoing training of program staff on what programmatic accessibility entails, best practices in promoting integrated and competitive employment, disability cultural competency, and examples of reasonable accommodations and modifications to policies, practices and procedures;
- Modification of standard equipment, technology or software programs used by the Title I-financially assisted program or activity as assessment, diagnostic, training, or skills-building tools;
- Coordination with other parts of a state's service and benefits delivery system, including assistance with navigating and maintaining ongoing benefit eligibility requirements.

Adoption of Gender-Neutral Language

We welcome the Department's recognition that nondiscrimination principles protect individuals of all genders, including individuals who do not identify as either male or female, and its decision to adopt gender-neutral language in the updated regulations.[78] The gender identity of individuals is a deeply-rooted aspect of who they are, and that is no different for those who identify with a gender other than male or female. While perhaps less familiar to many WIOA-funded program staff, this vulnerable sub-group within the transgender population is entitled to the same protections as are others.[79] Such individuals, however, face pervasive bias and

[78] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. at 4495; *see also,* Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, *supra* note 42; *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395, at *7 (Apr. 1, 2015) (recognizing that individuals who identify as both male and female or neither are protected from gender identity discrimination).

[79] The medical community has widely recognized the importance of affirming gender identities other than male or female, or non-binary genders, and providing those with non-binary genders equal access to services. *See, e.g.,* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People* 6 (2015) ("a non-binary understanding of gender is fundamental to the provision of affirmative care for [transgender and gender non-conforming] people"); World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender-Nonconforming People* 171, 175 (2012) (requiring physicians to provide affirming care for both binary and non-binary transgender and gender non-conforming patients); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Version 5* 451 (2013) (defining gender identity to include identities other than male or female); Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 25-26 (2011) (same).

misunderstanding, and often are unable to access benefits and services, including those of WIOA-funded programs. Regulatory language associated with the gender binary may exacerbate these barriers by suggesting that individuals with non-binary identities are excluded from many of the protections under WIOA. The adoption of gender-neutral language is a simple way to remove this barrier to nondiscrimination protections while signaling the Department's commitment to equal treatment for individuals with non-binary gender identities. Gender-neutral language also ensures that transgender men and women benefit from the full protections of the Department's regulations, such as by extending protections against pregnancy-related discrimination to transgender men who have or are perceived to have childbearing capacity.

Recommendations

We recommend that proposed § 38.7(a) be revised as follows:

> (a)…The term sex includes, but is not limited to, pregnancy, childbirth, and related medical conditions, **sexual orientation,** transgender status, and gender identity.

We further recommend that § 38.7(b) be revised as follows:

> (7) Denying individuals who are pregnant, who become pregnant, who plan to become pregnant, **or who are of childbearing capacity** opportunities for or access to aid, benefit, service, or training on the basis of pregnancy, **childbirth, or related medical conditions, including childbearing capacity**.
> **(8) Failing to provide individuals who are pregnant reasonable accommodations related to pregnancy or pregnancy-related medical conditions, where such accommodations are provided to or required to be provided to other program participants similar in their ability or inability to work.**
> ~~(8)~~ **(9)** Making any facilities associated with WIOA Title I-financially assisted program or activities available only to members of one sex, except that if the recipient provides restrooms or changing facilities, the recipient ~~**must**~~ **may** provide separate or single-user restrooms or changing facilities;
> ~~(9)~~ **(10)** Denying individuals access to the bathrooms **and other workplace facilities** ~~used by~~ **consistent with** the gender with which they identify.
> **(11) Refusing to treat individuals consistent with their gender identity, such as by deliberately and repeatedly using names and gender-related pronouns and titles that are inconsistent with their gender identity.**

We recommend that § 38.7(d) include the additional example below, which mirrors proposed revisions in the January 30, 2015 OFCCP Notice of Proposed Rulemaking implementing sex nondiscrimination requirements for federal contractors and subcontractors:

> **(10) Adverse treatment of an individual because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex.**

We recommend that § 38.10(b) be revised as follows:

> (b) Harassment because of sex includes harassment based on gender identity, **sexual orientation**, and failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, or related medical conditions; and sex-based harassment that is not sexual in nature but that is because of sex or where one sex is targeted for harassment.

We recommend that § 38.35 be revised as follows:

> The notice must contain the following specific wording:
>
> Equal Opportunity Is the Law
>
> It is against the law for this recipient of Federal financial assistance to discriminate on the following bases: Against any individual in the United States, on the basis of race, color, religion, sex (including pregnancy and childbirth and related medical conditions, sex stereotyping, transgender status, gender identity, **and sexual orientation**), national origin (including limited English proficiency), age, disability, political affiliation or belief; and against any beneficiary of programs financially assisted under Title I of the Workforce Innovation and Opportunity Act, on the basis of the beneficiary's citizenship status or his or her participation in any WIOA Title I-financially assisted program or activity."

Finally, to ensure consistency in its adoption of gender-neutral language, we encourage the Department to revise the following gender-specific language remaining in the proposed rule:

> § 38.4(q)(5)(iii)(C) …because of the additional time or effort ~~he or she~~ **the individual** must spend to read, write, speak, or learn compared to most people in the general population….
>
> (ii)(A) That disease or infection prevents ~~him or her~~ **the individual** from performing the essential functions of the job in question….
>
> § 38.16(h) *Surcharges.* A recipient must not ask or require an individual with a disability to pay a surcharge because of ~~his or her~~ **the individual's** service animal…. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by ~~his or her~~ **the individual's** service animal.
>
> § 38.30 …However, ~~he or she~~ **the EO Officer** must not have other responsibilities or activities that create a conflict or appearance of conflict with ~~the responsibilities of an EO Officer~~ **their responsibilities.**

§ 38.64(a) Where, as a result of a post-approval review, the Director has made a finding of noncompliance, ~~he or she~~ **the Director** must issue a Letter of Findings….

§ 38.81(d) Where the Director makes a referral under this section, ~~he or she~~ **they** must notify the complainant and the respondent about the referral.

§ 38.83 If the Director accepts the complaint for resolution, ~~he or she~~ **they** must notify in writing the complainant, the respondent, and the grantmaking agency.

§ 38.91(b)(3) If the Governor is able to secure voluntary compliance under paragraph (b)(1) of this section, ~~he or she~~ **the Governor** must submit to the Director for approval....

§ 38.115(c)(1) If the Director determines that the grant applicant or recipient has not brought itself into compliance, ~~he or she~~ **the Director** must issue a decision denying the petition.

Conclusion

The National Center for Transgender Equality commends the Department for taking the important step of issuing this proposed rule and for its ongoing efforts to implement crucial nondiscrimination protections for LGBT workers and other populations that are underrepresented in WIOA-funded programs. We urge you to finalize this rulemaking as quickly as possible to ensure that the benefits of equal opportunity reach everyone who needs them.